



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

3 2044 078 639 283



UNIVERSITY OF TORONTO LIBRARIES
LAW LIBRARY

Jan. 28
REPORTS

OF

CASES AT LAW AND IN EQUITY

DETERMINED BY THE

SUPREME COURT

OF THE

STATE OF IOWA

48

JANUARY AND MAY TERMS, 1910

BY

W. W. CORNWALL
REPORTER

VOLUME XXX

BEING VOLUME CXLVII OF THE SERIES.

CHICAGO, ILLINOIS:

T. H. FLOOD & CO., PUBLISHERS,
1910

Entered according to act of Congress in the year 1910, for the

State of Iowa,

By W. C. HAYWARD, SECRETARY OF STATE.

In the office of the Librarian of Congress, Washington, D. C.

JUL 7 1911

JUDGES OF THE SUPREME COURT.

HORACE E. DEEMER, *Chief Justice*, Montgomery County.
JOHN C. SHERWIN, Cerro Gordo County.
EMLIN McCLAIN, Johnson County.
SILAS M. WEAVER, Hardin County.
SCOTT M. LADD, O'Brien County.
W. D. EVANS, Franklin County.

OFFICERS OF THE COURT.

H. W. BYERS, *Attorney General*, Shelby County.
HENRY L. BOUSQUET, *Clerk*, Marion County.
W. W. CORNWALL, *Reporter*, Clay County.

JUDGES OF THE COURTS.

FROM WHICH APPEALS MAY BE TAKEN TO THE SUPREME COURT.

DISTRICT COURTS.

First District—H. BANK, Jr., Keokuk.

Second District—D. M. ANDERSON, Albia; F. W. EICHELBERGER, Bloomfield; M. A. ROBERTS, Ottumwa; C. W. VERMILLION, Centerville.

Third District—H. M. TOWNER, Corning; HIRAM K. EVANS, Corydon.

Fourth District—DAVID MOULD, Sioux City; F. R. GAYNOR, Le Mars; J. F. OLIVER, Onawa; WILLIAM HUTCHINSON, Alton.

Fifth District—J. D. GAMBLE, Knoxville; J. H. APPLEGATE, Guthrie Center; EDMUND NICHOLS, Perry.

Sixth District—K. E. WILLCOCKSON, Sigourney; BYRON W. PRESTON, Oskaloosa; W. G. CLEMENTS, Newton.

Seventh District—ARTHUR P. BARKER, Clinton; A. J. HOUSE, Maquoketa; D. V. JACKSON, Muscatine; JAMES W. BOLLINGER, Davenport.

Eighth District—RALPH P. HOWELL, Iowa City.

Ninth District—LAURENCE DE GRAFF, Des Moines; HUGH BRENNAN, Des Moines; W. H. McHENRY, Des Moines; JAS. A. HOWE, Des Moines.

Tenth District—CHAS. E. RANSIER, Independence; FRANKLIN C. PLATT, Waterloo.

Eleventh District—R. M. WRIGHT, Ft. Dodge; C. E. ALBROOK, Eldora; C. G. LEE, Ames.

Twelfth District—J. F. CLYDE, Osage; C. H. KELLEY, Forest City; J. J. CLARK, Mason City.

Thirteenth District—L. E. FELLOWS, Lansing; A. N. HOBSON, West Union.

Fourteenth District—D. F. COYLE, Humboldt; A. D. BAILIE, Storm Lake.

Fifteenth District—A. B. THORNELL, Sidney; EUGENE B. WOODRUFF, Glenwood; ORVILLE D. WHEELER, Council Bluffs; W. R. GREEN, Audubon.

Sixteenth District—F. M. POWERS, Carroll; Z. A. CHURCH, Jefferson.

Seventeenth District—C. B. BRADSHAW, Toledo; JNO. M. PARKER, Marshalltown.

Eighteenth District—W. N. TREICHLER, Tipton; F. O. ELLISON, Anamosa; MILO P. SMITH, Cedar Rapids.

Nineteenth District—ROBERT BONSON, Dubuque; MATTHEW C. MATTHEWS, Dubuque.

Twentieth District—JAMES D. SMYTH, Burlington; W. S. WITHERROW, Mt. Pleasant.

SUPERIOR COURTS.

Cedar Rapids—JAMES H. ROTHROCK.

Council Bluffs—S. B. SNYDER.

Keokuk—W. L. McNAMARA.

Oelwein—M. D. PORTER.

Grinnell—J. P. LYMAN.

Perry—JOHN SHORTLEY.

Shenandoah—W. P. FERGUSON.

TABLE OF CASES REPORTED IN THIS VOLUME.

A

Acken Coal Co., Risher v....	459
American Express Co., Cox v.	137
American Health & Accident Assn., Oliphant v.	656
Archer, Robbins v.	743

B

Baker v. Syfritt	49
Barnes v. Century Savings Bank	267
Bear v. City of Cedar Rapids	341
Bettendorf Axle Co., Hamm v.	681
Blackett v. Ziegler	167
Boone, Bummelhart v.	390
Boone Gas Co., Phelan v....	626
Botti, Sawyer v.	453
Botts, Kinman v.	474
Boynton v. Salinger	537
Brown, Creveling v.	45
Bruggeman v. Railway	187
Buck, Jones v.	494
Bummelhart v. Boone	390
Bunting, Tuttle v.	153

C

Carson, State v.	561
Carr v. District Court	663
Case v. Chicago G. W. Ry. Co.	747
Catholic Society, Shea v. ...	150

Cech v. City of Cedar Rapids	247
Center Coal Mining Co., Cottenham v.	427
Century Savings Bank, Barnes v.	267
Century Fire Ins. Co., Eckert v.	507
Chicago & Great Western Ry. Co., Case v.	747
Chicago & G. W. Ry. Co., Tretter v.	375
Chicago, M. & St. P. Ry. Co., Longshore v.	463
Chicago & N. W. Ry. Co., Jeffries v.	124
Chicago, R. I. & Pac. Ry. Co., Gregory v.	715
Chicago, R. I. & Pac. Ry. Co., McMillan v.	596
City of Cedar Rapids, Bear v.	341
City of Cedar Rapids, Cech v.	247
City of Des Moines, Fullerton v.	254
City of Keokuk, Collins v....	233
City of Keokuk, Collins v....	605
Citizens National Bank v. Gardner	695
Cline, Cox v.	353
Colfax Consolidated Coal Co., Stewart v.	548
Collins v. City of Keokuk...	233
Collins v. City of Keokuk...	605
Collins, Live Stock Nat. Bank v.	107
Commercial Building Co., Winslow v.	238

CASES REPORTED.

Consolidated Block Coal Co.,	
Duffey v.	225
Continental Casualty Co.,	
Currie v.	281
Constantine v. Rowland	142
Corrick v. Dunham	320
Cotton v. Center Coal Mining Co.	427
Cox v. American Express Co.	137
Cox v. Cline	353
Creveling v. Brown	45
Currie v. Continental Casualty Co.	281
Cutler, Shea v.	366

D

Davis v. Laughlin	478
Davis, Logan v.	441
Davis v. Iowa Cent. Ry. Co.	594
Delahoyde, State v.	327
Dermedy v. Jackson	620
Des Moines City Ry. Co., Hopps v.	580
Dickson v. Sioux City Ry. Co.	601
Dolan v. Sammons	466
Dougherty, State v.	570
Douglass, Jr., v. Lougee....	406
Dowden Mfg. Co., Ross v....	180
Dubois v. Luthmers	315
Dudley, State v.	645
Duetzmann v. Kuntze	158
Duffey v. Consolidated Block Coal Co.	225
Dunham, Corrick v.	320
Dyer, State v.	217

E

Eckert v. Insurance Co.	507
------------------------------	-----

F

Federal Land & Securities Co. v. Hatch	18
Finley, State v.	563

Fritz v. Snider	352
Fullerton v. City of Des Moines	254

G

Galucha v. Naso	309
Gardner, Citizens Nat. Bank v.	695
Graham v. McKinney	164
Great Northern Ry. Co., Mc- Millan v.	596
Gregory v. Chicago, R. I. & Pac. Ry. Co.	715
Greenland, Kirkpatrick v.	37
Griffith, Manatt v.	707

H

Hamilton County, Schropfer v.	63
Hamm v. Bettendorf Axle Co.	681
Hatch, Land Securities Co. v.	18
Hawkeye Commercial Men's Assn., Jenkins v.	113
Herrington, State v.	636
Hewitt & Hosier v. Lichty Mfg. Co.	270
Hopps v. Des Moines City Ry.	580
Hospers, State v.	712
Hulsman, State v.	572

I

Illinois Cent. Ry. Co., Brug- geman v.	187
In re Estate of Munier	312
In re Estate of Phelps	323
In re Will of Van Houten..	725
Iowa Central Ry. Co., Davis v.	594

J

Jackson, Dermedy v.	620
--------------------------	-----

James v. Newman	574
Jeffries v. Chicago & N. W. Ry. Co.	124
Jenkins v. Hawkeye Commer- cial Men's Assn.,	113
Junkins, State v.	588
Jones v. Buck	494

McMillan v. Great Northern Ry. Co.	596
Meighen, Wayt & Son v....	26
Merrill v. Phelps	323
Michel, Munier v.	312
Munier v. Michel	312

N**K**

Kearney, Sauser v.	335
Kings Crown Plaster Co., Royer v.	277
Kinman v. Botts	474
Kirkpatrick v. Greenland ...	37
Kuntze v. Duetzmann	158

Naso, Galucha v.	309
National Hatchet Co., Owen v.	393
Negles, Rueber v.	734
Neilan v. Unity Invest. Co.	677
Neiting, Savings Bank v.	119
Newman, James v.	574
Norman Lichy Mfg. Co., Hewitt & Hosier v.	270

L

Lagomarcino Grupe Co., Con- stantine v.	142
Laughlin, Davis v.	478
Lillie v. Owen	290
Lininger Imp. Co., Loxter- camp v.	29
Live Stock Nat. Bank v. Col- lins	107
Logan v. Davis	441
Lougee, Douglass, Jr., v.	406
Longshore v. Chicago, M. & St. P. Ry. Co.	463
Lowden Savings Bank v. Neiting	119
Loxtercamp v. Lininger Imp. Co.	29
Luettjohann v. Luettjohann..	286
Luthmers, Dubois v.	315

O

Oliphant v. Health & Acci- dent Assn.	656
O'Neill, State v.	513
Ottley, State v.	329
Owen, Lillie v.	290
Owen v. National Hatchet Co.	393

P

Parker, State v.	69
Peitzman v. Peitzman	704
Pockert, Tuttle v.	41
Phelan v. Boone Gas Co....	626
Phelps, Merrill v.	323

R

Redhead, Swift & Co. v.	94
Rew v. Maynes	15
Rhea, Wurlitzer Co. v.	382
Rice v. Rice	1
Richards v. Watts	557
Ridings v. Marengo Sav. Bank	608
Risher v. Acken Coal Co....	459

M

Manatt v. Griffith	707
Marengo Savings Bank, Rid- ings v.	608
Maynes, Rew v.	15
McAuley, Stein v.	630
McKinney, Graham v.	164

Robbins v. Archer	743	Swift & Co. v. Redhead ...	94
Robinson v. Robinson	615	Syfritt, Baker v.	49
Ross v. Dowden Mfg. Co....	180	T	
Rowland, Constantine v.	142	Talley, Treasurer, Woodbury	
Royer v. Kings Crown Plaster Co.	277	County v.	498
Rueber v. Negles	734	Tretter v. Chicago & G. W.	
		Ry. Co.	375
S		Tucker v. Stewart	294
Saint, Tuffree v.	361	Tuffree v. Saint	361
Salinger, Boynton v.	537	Tuttle v. Bunting	153
Salinger v. Telegraph Co. ...	484	Tuttle v. Pockert	41
Sammons, Dolan v.	466	Tyrrell v. Shannon	184
Sanborn State Bank, Smith v.	640		
Sauser v. Kearney	335	U	
Sawyer v. Botti	453	United States Fidelity & Guar-	
Schropfer v. Hamilton County	63	anty Co., Constantine v....	142
Shannon, Tyrrell v.	184	Unity Investment Co., Neilan	
Shea v. Catholic Society	150	v.	677
Shea v. Cutler	366		
Sioux City Terminal Ry. Co.,		V	
Dickson v.	601	Van Buren Dist. Court, Carr	
Smith v. Sanborn State Bank	640	v.	663
Snider, Fritz v.	352	Van Houten, In re Will of..	725
State v. Carson	561		
State v. Delahoyde	327	W	
State v. Dougherty	570	Watkins, State v.	566
State v. Dudley	645	Watts, Richards v.	557
State v. Dyer	217	Wayt & Son v. Meighen ...	26
State v. Finley	563	Western Union Tel. Co., Sal-	
State v. Herrington	636	inger v.	484
State v. Hospers	712	Winslow v. Commercial	
State v. Hulsman	572	Building Co.	238
State v. Junkins	588	Woodbury County v. Talley,	
State v. O'Neil	513	Treasurer	498
State v. Ottley	329	Wurlitzer Company v. Rhea.	382
State v. Parker	69		
State v. Watkins	566	Z	
Stein v. McAuley	630	Ziegler, Blackett v.	167
Stewart v. Colfax Coal Co.	548		
Stewart, Tucker v.	294		

REPORTS
OF
CASES AT LAW AND IN EQUITY
DETERMINED BY THE
SUPREME COURT
OF THE
STATE OF IOWA
AT
JANUARY AND MAY TERMS, 1910.
AND IN THE SIXTY-FOURTH YEAR OF THE STATE.

**EMILY M. RICE ET AL., Appellants, v. W. I. RICE ET AL.,
Appellees.**

Dower: ASSIGNMENT FROM A PORTION OF THE ESTATE. The dower interest of a widow in the estate of her deceased husband may be assigned to her from so much of one or more of the tracts of land as equals one-third in value of the entire estate, where her interest in the estate will not thereby be prejudiced.

Wills: SATISFACTION OF DEVISE BY SUBSEQUENT CONVEYANCE: ASSIGNMENT OF DOWER. The conveyance to devisees by general warranty of lands theretofore devised to them is a satisfaction of the bequests, and the property passes to them under the conveyances rather than by the will, even though made by way of gift, subject only to the right of the widow's share therein; provided the same can not be assigned to her from the remaining estate lands without prejudice to her rights. And where it is made to

VOL. 147 IA.—I.

appear that the widow can, without prejudice, take her share out of the remaining lands, she will be required to do so.

Rights of widow: WAIVER OF HOMESTEAD RIGHT: ASSIGNMENT OF DOWER: STATUTE. The primary intent of the statute relating to the assignment of dower is to protect the widow by allowing her to continue in the use and occupancy of the homestead if she so desires, but she may waive this right and take her distributive share of the property, not including the dwelling house given by law to the homestead. She does not, however, have the right to absolutely dictate that portion which shall be set off to her regardless of the rights of others, that question being for final determination by the court, but she may indicate the arrangements which she prefers.

Assignment of dower: APPORTIONMENT IN KIND: SALE OF PROPERTY.

4 Where it appears that the widow can properly be required to take her distributive share from lands of the estate not conveyed by the testator to certain heirs in satisfaction of bequests to them, but that such remaining lands can not equitably be apportioned in kind between the widow and the other heirs, the court instead of making a division of the property in kind should order a sale of the same, in whole or in part, as the best interests of the parties require.

Deemer, C. J., and Sherwin, J., dissenting.

Appeal from Mahaska District Court.—Hon. B. W. Preston and Hon. W. G. Clements, Judges.

SATURDAY, APRIL 9, 1910.'

SUIT in equity for the partition of four hundred and sixty-four acres of land. There was a decree from which plaintiffs appeal.—*Reversed and remanded.*

John F. & Wm. R. Lacey, for appellants.

W. H. Keating, Bolton & Bolton, and Bowen & Alberson, for appellees.

EVANS, J.—This is an action for the partition of real estate formerly belonging to Wm. H. H. Rice. It was

brought by his widow, Emily M. Rice, and her son, A. L. Rice; but she has died since the case was decided in the district court, and her son and administrator, A. L. Rice, has been substituted as plaintiff. In 1889 Wm. H. H. Rice made a will, by the terms of which he devised to his wife, Emily M. Rice, one-third of all the real estate of which he might die seised in lieu of her statutory share therein. In the seventh clause of said will he bequeathed to his daughter, Mrs. Ella J. Cochran, eighty acres of land "free from any lien or indebtedness whatever," and by the eighth clause of said will he bequeathed to his son Wm. I. Rice another eighty acres of land "free from any lien or incumbrance whatever." Both of these tracts of land were specifically described, and together they constituted the tract spoken of in the record as the one hundred and fifty-nine acres lying south of the east and west road." At the time the will was made, and at the time of the testator's death, he also owned what was known as the "homestead farm," consisting of two hundred and forty-four acres just north of the road in question, and separated from the one-hundred-and-fifty-nine-acre tract by such road. The tenth clause of the will was as follows: "I hereby give and bequeath all the rest and residue of my estate, both real and personal not heretofore bequeathed, to my said children, Mrs. Ella J. Cochran, Wm. I. Rice, and Abraham L. Rice, in equal shares, hereby intending to vest in my last-named children share and share alike, all the rest and residue of my estate in fee simple absolutely not heretofore conveyed to my legatee." Ella J. Cochran and Wm. I. Rice were children by a former wife, while Abraham L. Rice was his son by his then wife, Emily M. Rice. In the twelfth clause of the will this was said: "My beloved son Abraham L. Rice being the only son of my wife Emily M. Rice and the heir to the estate by me hereby bequeathed to her is the reason why I make no further provision for him

than I have in this my last will and testament." No change was ever made in this will, but on the 19th of March, 1900, the testator executed and delivered to Ella J. Cochran and Wm. I. Rice separate warranty deeds, conveying to each of them the specific land that was bequeathed to them by the seventh and eighth clauses of his will. On the same day that these two conveyances were made, Ella J. Cochran and her husband conveyed by warranty deed to Wm. I. Rice the eighty that had just been conveyed to her by her father. In December, 1892, Wm. H. H. Rice executed and delivered to Wm. I. Rice a writing wherein he referred to his will of 1889 and the bequest of the eighty acres therein described to Wm. I. Rice, and agreed that, in case the purpose of his will was not so carried out as to give Wm. I. Rice the eighty devised to him, the value of the improvements placed thereon by said son was to be a claim against his estate, and it was further said therein: "But if said W. I. Rice receive said land by bequest as contemplated and intended and provided in my said will then this agreement shall become void and of no effect either in law or equity." The wife, Emily M. Rice, did not join in the deeds from her husband to Ella J. Cochran and Wm. I. Rice; and it is conceded that she retained her statutory interest in the land at the time suit was brought, she having declined to take under the will. The widow's share in the two tracts named were set apart from the two-hundred and forty-four-acre tract and included the buildings, and, by taking her interest in the one-hundred and fifty-nine-acre tract from the two-hundred and forty-four-acre tract, two-thirds of the residue of which was given to A. L. and W. I. Rice and Mrs. Cochran by the will, A. L. Rice was compelled to contribute to the satisfaction of the widow's interest in the one-hundred and fifty-nine-acre tract.

The appellants claim that the widow had the right to take her statutory interest in the one-hundred and fifty-

nine-acre tract from that tract, and that the same should be set apart to her without reference to her interest in the land north of the road; but, if that is not done, that her share of the one hundred and fifty-nine acres should be charged against only the interests of Wm. I. Rice and Ella J. Cochran in the two-hundred and forty-four-acre tract.

At common law it was the general rule that the widow was entitled to have her dower assigned in the several parcels in which she held the same, and the only

i. DOWER: assignment from a portion of the estate.

exception to this rule was made in specific instances when the husband died seised; and in *O'Ferrall v. Simplot*, 4 Iowa, 381, we

held that, when the husband had conveyed one of several parcels to which dower attached, the widow could not be compelled to take from one parcel alone. The decision in that case rests largely upon the thought that the widow should not be required to take in such way as to endanger her interest, and such is undoubtedly the law; but in subsequent cases this court held that the widow's interest might be assigned in one tract, when it could be done without injury to such interest. *Montgomery v. Horn*, 46 Iowa, 286; *Jones v. Jones*, 47 Iowa, 338. It is true that in both of the cases just referred to the husband died seised of the several tracts; but, as the statute (Code, section 3366) provides that "one-third in value" shall be set apart to the widow, we see no reason why the interest in several tracts may not be assigned from so much of one or more tracts as will in fact constitute one-third in value of the whole. If this can be done without in any way diminishing the estate of the widow, she surely can not complain.

II. That Ella J. Cochran and W. I. Rice acquired title to the land described in the seventh and eighth clauses of the will by conveyance, and not through the will, can not be questioned. The execution of the deeds

constituted a satisfaction of the will, and thereafter there was no property to pass under said clauses.

2. **WILLS:** satisfaction of devise by subsequent conveyance; assignment of dower.

Hall v. Hall, 132 Iowa, 664; *In re Will of Miller*, 128 Iowa, 612; *Davis v. Close*, 104 Iowa, 261. This is in accord with the contention of appellants, and is conceded by appellees. We are therefore relieved of the necessity of construing paragraphs seven and eight of the will. We see no way, however, to avoid giving effect to these conveyances strictly in accord with their terms. They were warranty deeds with full covenants. So far as the estate itself and the beneficiaries of the will are concerned, these deeds carried to the grantees the full and complete title to the tracts therein described. Only the widow can ignore them. And she is in no position to do so if her "one-third in value" can be set apart without prejudice to her in the remaining real estate owned by the decedent at the time of his death. The devisees of the will can stand in no better position than the testator himself occupied after making such conveyances. If the warranty deeds were complete and binding as to him, they are clearly so as to his devisees. It is argued that the remedy of grantees would be an action for damages for breach of covenants, and that they could recover therein only nominal damages, because the deeds were executed as a gift of the land. But the grantees are not bound to resort to an action for damages. We see no ground for holding that they may not maintain their possession and ownership under their deeds and in accordance with the terms thereof, subject only to the contingency that the widow might resort to the conveyed lands if necessary to the protection of her rights. Surely, if the grantees were purchasers for value, equity would protect them in their purchase to the extent that it would require the widow to take her one-third value in the remaining lands if it could be done without prejudice to her. We see no logical way

of escape from applying the same rule, even though the conveyances were intended by the grantor as completed gifts. Even then the form of the conveyance must be considered as evincing the intent of the testator that the widow's share should be taken in the remaining lands, if possible. The devisees of the estate are in no position to ignore the deeds. We must hold, therefore, that the grantees in the deeds in question as between them and their grantor, and as between them and his estate and its beneficiaries, took full title in accord with the terms of the instruments. It being made to appear, also, that the widow can take her share out of the remaining lands without prejudice to her, it follows that she must be required to do so. This was the result reached by the trial court at this point, although reached by a different course.

The question has been argued whether the devise contained in the tenth clause of the will was a specific devise. The question is a debatable one, but, in the view we take of the case, we have no occasion to determine it. Even if it should be regarded as a specific devise, it could not change the effect of the warranty deeds referred to. We hold that the residue of the two hundred and forty-four acres over and above the widow's full dower interest carved therefrom should be equally divided among the three children, and this was the finding of the trial court as above indicated.

III. Land was set apart to the widow upon which was situated the dwelling house given by law to the homestead. Of this complaint is made; the appellants con-

3. RIGHTS OF
widow:
waiver of
homestead
right:
assignment
of dower:
statute.

tending that, under the provisions of section 3367 of the Code, she had the right to elect what land should be assigned to her, inasmuch as there were no debts of the decedent.

The section in question is as follows: "The distributive share of the survivor shall be set off so as to include the ordinary dwelling house given by law to

the homestead, or so much thereof as will be equal to the share allotted to her by the last section unless she prefers a different arrangement, but no such arrangement shall be permitted unless there be sufficient property remaining to pay the debts of the decedents." The primary intent of this section is to protect and favor the widow to the extent of allowing her to continue in the use and occupancy of the homestead if she so desires; but she may waive this right, and, if she does so, the statute under consideration clearly gives her the right to take her share from a portion of the property which does not include the dwelling house given by law to the homestead. It does not in our judgment, however, permit her to dictate absolutely the different arrangement or to arbitrarily name the particular portion that shall be set off to her regardless of the other interests. She may, of course, indicate the arrangement that she prefers, but the final determination of the question rests with the court. *Wright v. Breckenridge*, 125 Iowa, 197; *Edinger v. Bain*, 125 Iowa, 391. There was error in compelling the widow to take a share which included the dwelling house.

It is urged by appellee that it was impossible to make an equitable division in kind of the two hundred and forty-four acres without including the dwelling house in the

share of the widow. It is true that the evidence tends to show that the improvements in question were adapted in size to the use of the farm of two hundred and forty-four acres. It appears, also, from the testimony that, if the widow's full share is awarded to her in kind outside of the dwelling house and its appurtenances, it would only leave fifty or sixty acres with the dwelling house to be divided among the three residuary legatees. It is claimed that a division of that kind including the dwelling house would be impracticable between the three residuary devisees, because the dwelling would have to be included

4. ASSIGNMENT
OR DOWER:
apportion-
ment in
kind: sale
of property.

in some share. Manifestly this could not be done without reducing the acreage of such share, and the buildings could not have a normal value without a reasonable acreage of land appurtenant to them. This argument appeals to us as a strong reason why none of the residuary devisees should be required to take the dwelling. It furnished, also, a reasonable ground of objection by the widow against including the same in her share, although it would involve a less degree of hardship to her than to the others. This argument does not furnish a sound reason why the widow should be compelled to take the dwelling house. It does furnish a reason why the lower court should order a sale of the tract, either in whole or in part, in lieu of a partition in kind. If a division in kind is not practicable without a sacrifice of value in the improvements, the lower court has full power to deal with the situation as it is, and to order a sale in whole or in part, as the best interests of the parties require. This action is in partition, and our statutes on that subject are applicable thereto. For the error pointed out in requiring the widow to take the dwelling house, the decree of the trial court is reversed, and the cause is remanded, with full power to the trial court to deal with the case in harmony with this opinion, including the power to take further evidence if necessary, and to order a partition sale of the two hundred and forty-four acres if he be so advised.

Reversed and remanded.

SHERWIN, J.—I can not agree with the conclusion reached by the majority in the second division of the opinion.

DEEMER, C. J. (dissenting).—As I understand, the majority opinion holds that the widow is not required to take the dwelling house which is situated upon the two-hundred and forty-four-acre tract of land; but that she is required to take her distributive share out of the two

hundred and forty-four acres, thus relieving the one hundred and fifty-nine acres of any burden; and that by reason of the warranty deeds executed by the testator, his wife not joining therein, the grantees therein should not be held to contribute toward her distributive share taken out of the two hundred and forty-four acres. This conclusion is reached against the widow's consent, and is bottomed, if I understand the case correctly, largely upon the deeds executed by the testator to Ella J. Cochran and Wm. I. Rice. I can not agree to this conclusion.

Section 3270 of the Code provides: "Any person of full age and sound mind may dispose by will of all his property, subject to the rights of homestead and exemption created by law, and the distributive share in his estate given by law to the surviving spouse, except sufficient to pay his debts and expenses of administration." Section 3376 of the Code Supplement reads as follows: "The survivor's share can not be affected by any will of the spouse, unless consent thereto is given within six months after a copy thereof has been served upon the survivor by the other parties interested in the estate." Section 3366 of the Code reads: "One-third in value of all the legal or equitable estates in real property possessed by the husband at any time during marriage, which have not been sold on execution or other judicial sale, and to which the wife had made no relinquishment of her right, shall be set apart as her property in fee simple, if she survive him." Section 3367 provides: "The distributive share of the survivor shall be set off so as to include the ordinary dwelling house given by law to the homestead, or so much thereof as will be equal to the share allotted to her by the last section, unless she prefers a different arrangement; but no such arrangement shall be permitted unless there be sufficient property remaining to pay the debts of the decedents." Section 3369 provides: "The survivor's share may be set off by the mutual consent of all parties

in interest, or by referees appointed by the court or the judge thereof, the application therefor to be made in writing, after twenty days from the death of the intestate and within ten years, which application must describe the land in which the share is claimed, and pray the appointment of referees to set it off." Section 3375 provides: "If the referees report that the property or any part of it can not be readily divided, the court may order the whole sold and one-third of the proceeds paid over to the survivor, but no sale shall be made if any one interested gives security to the satisfaction of the court, conditioned to pay the survivor the appraised value of the share, with eight percent interest on the same, within such reasonable time as it may fix, not exceeding one year." Section 3378 reads as follows: "Subject to the rights and charges hereinbefore provided, the remaining estate of which the decedent dies seized shall, in the absence of a will, descend in equal shares to his children." And section 3279a of the Code Supplement reads as follows: "All claims which it becomes necessary to satisfy, and all amounts necessary to be paid from the estate of a testator in disregard of or in opposition to the provisions of a will, shall be taken ratably from the interests of heirs, devisees, and legatees."

I think it clear from these sections that the widow is entitled to her distributive share in all real property possessed by the husband and at any time during the marriage and to which she had made no relinquishment of her right, and that the same should be set apart to her in fee simple; and it is also clear that no one can by will dispose of the right of homestead or distributive share given by law to the surviving spouse. The widow has the right to take the homestead in lieu of dower, and may have her distributive share so set off as to include the dwelling house, unless she prefers a different arrangement. Her share may be set off by mutual consent or by referees appointed by the court, and a sale rather than a partition

in kind may be ordered. Primarily it is for the widow to say whether she will take homestead or distributive share, and, if the latter, how she will have it set apart to her—that is to say, whether it shall be a part of each of several tracts, or out of one or more separate tracts, and whether it shall include the dwelling house. Unless her wishes be arbitrary or opposed to section 3367, they should be respected for the reason that neither the husband, his grantees, nor his heirs can deprive her of her distributive share, or in any manner limit her rights or privileges. I think this has been held in all our cases. See *O'Ferrall v. Simplot*, 4 Iowa, 381; *Montgomery v. Horn*, 46 Iowa, 285; *Jones v. Jones*, 47 Iowa, 337; *Corriell v. Bronson*, 6 Iowa, 471. It will be noticed in each of these that the survivor's wishes were made controlling. It is clear to my mind that the widow has her right of dower or distributive share in each of the several parcels of land owned by her husband at any time during marriage to which she has made no relinquishment, and that, generally speaking, she has the right to say how it shall be set aside. If she does not take from each tract, then the statute (Code Supp., section 3279a) says in effect that the overplus taken from any other shall be ratably taken from the interests of the heirs, devisees, and legatees. In my opinion the widow had the right at her election to take her distributive share from the one hundred and fifty-nine acres, one-third in value thereof properly marked out by metes and bounds, and one-third in value of the two hundred and forty-four acres set off to her by metes and bounds, so as not to include the homestead if she so elected. The majority do not seem to entertain this opinion and this is the first point of difference between us.

The majority say, as I understand it, that she must take her share out of the two-hundred and forty-four-acre tract; that she will not be compelled to take the dwelling

house, but that nothing shall be taken from the one hundred and fifty-nine acres; and that in no event shall the grantees of the one hundred and fifty-nine acres by deed from the testator alone be made to contribute to the share of which the devisees under the tenth clause of the will are deprived by reason of the widow's taking her dower out of the two-hundred and forty-four-acre tract. In other words, the devisees under the tenth clause of the will are made to bear the entire burden of the distributive share. Here again I am constrained to register my dissent. If the widow is compelled without her consent to take her distributive share out of the two hundred and forty-four acres, it seems to me that all the other legatees, heirs, and devisees should be compelled to bear their proportion ratably out of the property received by them. This is the language of the statute as I understand it. The effect of the opinion of the majority is to make Abraham L. Rice bear almost the entire burden of the widow's distributive share. I do not think this was testator's intent, and, if it were, such a rule is contrary to the express language of the statute. I find nothing in the twelfth clause of the will which justifies the conclusion of the majority. The testator knew that he could not dispose of, or in any manner limit his widow's distributive share, and he did not attempt in any manner to do so. In fact, he recognized his wife's right to her one-third in the will itself. The conclusion of the majority is bottomed wholly upon the conveyances made by the testator to his children, Ella J. Cochran and William I. Rice, of property which he had theretofore devised them by will. These conveyances were signed by the testator alone, his wife not joining therein, and were purely voluntary. No consideration was paid therefor, and the grantees obtained nothing more than they would have received under the will. These conveyances did nothing more than satisfy or adeem the devises already made to them in the will. *Hall v. Hall*, 132 Iowa, 664.

And the grantees are not entitled to any greater rights thereunder in so far as the widow is concerned than if they had taken under the will. In neither case was the widow's distributive share in any manner affected. Moreover, while these conveyances may have been by warranty deed, nothing was paid for said deeds and no action may be maintained against the estate or the heirs on account of the warranty. *Knadler v. Sharp*, 36 Iowa, 234; *Richards v. Homestead Co.*, 44 Iowa, 304. Even if the covenants of warranty were enforceable, I do not see how they can be worked out in this proceeding for a partition. If recovery may be had thereon, it must be of damages, and for this the personal estate of the deceased is liable, and claims should be made against the estate therefor. So worked out, each and all the heirs will bear their just and equitable proportion thereof. The conclusion of the majority makes the heavy part of the contribution to be borne by A. L. Rice, who takes under the tenth paragraph of the will. This, I think, is not only inequitable; but contrary to law. I do not think these warranty deeds cut any figure in the case; but, if they do, the majority has made them do a service which the law does not warrant. See, as sustaining these conclusions, *Morey v. Morey*, 113 Iowa, 152; *McGuire v. Luckey*, 129 Iowa, 559. In my opinion the decree of the district court is wrong in the particulars above mentioned, and the majority opinion is also erroneous in the respects above set forth. I think the widow should be permitted to take her share out of both the one hundred and fifty-nine and the two-hundred and forty-four-acre tracts, and that she should not be compelled to take the dwelling house on the two hundred and forty-four acres. If this be done, there will be no need for any accounting. If, however, she should elect to take all out of the two hundred and forty-four acres, the amounts taken in disregard of the will should be appor-

tioned ratably out of the interests of all the heirs, devisees, and legatees.

I would not only reverse, but I would go to the extent indicated in this dissent.

GEORGE T. REW, Appellant, v. JOHN MAYNES.

Landlord and tenant: SALE OF CROP BY TENANT: RECOVERY BY LANDLORD. A landlord who predicates his right to recover for grain sold by the tenant, on the ground that the security of his lien for rent is impaired to that extent, may recover as for conversion against one who purchased and removed the same with notice or knowledge of his lien.

Same: CONSTRUCTION OF CONTRACT: OWNERSHIP OF CROP. Where the plaintiff, as in this case, contracted with the defendant to furnish him with teams and implements for raising a crop, and that the defendant should have possession of the land until the crop was harvested, should gather and deliver to the plaintiff the rent share of the crop, and that defendant should receive as pay for his labor the market price of a portion of the crop; it is held, that the contract was one of lease of the premises for a share of the crop as rent and that the crop was the property of the defendant subject to plaintiff's lien, under the rule that in the absence of a contrary agreement the product of the leased premises belongs to the tenant.

*Appeal from Mills District Court.—Hon. A. B THORNELL,
Judge.*

SATURDAY, APRIL 9, 1910.

ACTION to recover in damages the value of six hundred and twenty-five bushels of corn purchased by defendant from one Richardson, who under contract with plaintiff had raised said corn on plaintiff's premises. Defendant's demurrer to plaintiff's petition was sustained, and the petition was dismissed. Plaintiff appeals.—*Affirmed.*

Genung & Genung, for appellant.

W. E. Mitchell and W. S. Lewis, for appellee.

McCLAIN, J.—Under a written contract drawn in the form of a lease, one Richardson took possession of certain premises of the plaintiff prior to 1908, and by extension of the contract was to remain in possession thereof from March 1, 1908, until March 1, 1909, for the purpose of raising corn and other grain thereon; it being stipulated that plaintiff should furnish the necessary seed and farm implements for raising the crop, and that Richardson should deliver the corn grown on the premises to plaintiff on or before the 15th day of December, and receive pay for one-fourth thereof at the market price. It was also provided that out of the amount which would thus become due to Richardson plaintiff should be entitled to retain any sums of money advanced by him to Richardson; it being specially provided that plaintiff should have a lien on the crops for all sums thus advanced. It is alleged that plaintiff had advanced to Richardson under this contract a sum of money in excess of the amount which would be due to Richardson for his one-fourth of the crop of corn, and that plaintiff thereby became the owner of the entire crop, and that defendant, with knowledge of the terms of this contract, purchased from Richardson and removed from the premises during the month of December, 1908, six hundred and twenty-five bushels of said corn, worth fifty cents per bushel, and plaintiff asked judgment against defendant for the value of said corn thus alleged to have been wrongfully converted by defendant.

The question presented for determination is whether plaintiff was the owner of the corn bought by defendant

1. **LANDLORD AND TENANT:** leased premises. It is not contended for **sale of crop by tenant:** defendant that plaintiff did not have a **recovery by landlord.** contract lien in the nature of a mortgage to secure his rent and money advanced to Richardson. If plain-

tiff had predicated his right to recover on his contract lien, and demanded from defendant possession of the corn on the ground that the security of his lien was impaired to the extent to which corn was taken from the premises by defendant, he would have had a right of action for conversion. *Beck v. Minn. & W. Grain Co.*, 131 Iowa, 62; *Frorer v. Hammer*, 99 Iowa, 48; *Blake v. Counselman*, 95 Iowa, 219; *Evans v. Collins*, 94 Iowa, 432.

But plaintiff predicated his right to recover on the absolute ownership of the corn, and his counsel contend that under the agreement between him and Richardson

^{2. SAME: construction of contract: ownership of crop.} the latter never had any title to the corn, but was to receive, by way of compensation for his labor in raising it, the market price of an one-fourth portion thereof. We do not

so interpret the contract. It is in the form of a lease under which Richardson was entitled to the possession of the premises until the crop should be matured and harvested, and, while there is language in the instrument implying a delivery of all the corn raised to plaintiff, the specific provision with reference to such delivery was that Richardson should gather and deliver "all rent corn in good condition on or before the fifteenth day of December," and that the corn should be gathered out and the fields turned over to plaintiff on or before that date; and, also, that Richardson would gather out the rent corn first and notify plaintiff so that he might examine the fields as to the correctness of the division. We think it plain that the parties contemplated a leasing under which Richardson should be entitled to raise a crop of corn on the premises and deliver three-fourths thereof to the plaintiff by way of rent, plaintiff furnishing implements, teams, etc., for the purpose, and that until the corn was thus gathered and plaintiff's portion thereof delivered the crop should be the property of the tenant, subject to plaintiff's lien for rent and a contract lien for money advanced. In the

absence of any specific contract to the contrary, the produce of the leased premises belongs to the tenant. *Munier v. Zachary*, 138 Iowa, 219. We find no language in this contract creating an exception to such rule, and we think that, when Richardson sold a portion of the corn to defendant, he was transferring title to his own property, and not the property of plaintiff. As plaintiff did not predicate his right to reconvey on the impairment of his lien, but upon full and complete ownership, the demurrer to his petition was properly sustained.—*Affirmed.*

THE FEDERAL LAND & SECURITIES COMPANY, Appellee, v.
J. W. HATCH, Appellant.

**Contracts for the sale of real estate: OFFER TO PURCHASE: TERMS
1 OF ACCEPTANCE.** Where the vendor of land attempts to convert an offer to purchase into a binding contract of sale, the acceptance of the offer must be of the very terms proposed; and if the seller undertakes to qualify his acceptance or to impose upon the buyer additional terms and conditions there is no contract which either party can enforce.

In this action the defendant submitted a written proposition of purchase together with a check for the amount of his first payment as provided in his proposition, but the plaintiff's acceptance contained terms and conditions not contemplated by the proposition, and the defendant is held to have been justified in refusing payment of the check and that plaintiff is not entitled to recover thereon.

Same: ACCEPTANCE AND APPROVAL OF OFFER TO PURCHASE. A written
2 proposition for the purchase of land, which contains an express declaration that the same is made subject to approval by the seller, is not binding until the same is accepted and approved as provided.

Same: WHEN A CONTRACT BECOMES BINDING. A written proposition
3 to purchase land may of itself constitute a binding contract if such was the intention of the parties, even though a further and more formal writing was contemplated; yet this is only the case where the terms of the formal writing have been agreed upon. And where it was the understanding of the parties that a future

writing should be executed by them detailing the terms and conditions of the transaction, it is a general rule that no contract is in fact effected until such writing is executed.

Same. Where the proposition to purchase is uncertain and indefinite as to some material terms there is a strong presumption that it was merely preliminary to a further contract, in which these matters should be agreed upon in detail.

Same: ACCEPTANCE BY A THIRD PARTY. Where a proposition to purchase land is made to a certain person or corporation, contemplating acceptance by such person or corporation and a further written agreement detailing the terms and conditions of the purchase, the vendor can not insist that the purchaser enter into such future contract with a third person unless he chooses so to do; and where, as in this case, the subsequent contract was presented by the vendor in the name of another and was refused by the vendee that terminated the contract.

*Appeal from Green District Court.—Hon. F. M. Powers,
Judge.*

SATURDAY, APRIL 9, 1910.

THIS action was begun at law to recover upon a bank check drawn by defendant and on which payment had been refused. The defendant filed answer denying liability and pleading an affirmative defense, with cross-petition asking that the check sued upon be held void. On motion the cause was tried as in equity. There was a decree for the plaintiff, and defendant appeals. The facts material to a disposition of the appeal are sufficiently stated in the opinion.—*Reversed.*

W. W. Turner and Wilson & Albert, for appellant.

Woodin & Ayres and Gallaher & Graham, for appellee.

WEAVER, J.—The petition alleges no more than that on a given date defendant made and delivered to plaintiff his check on the Bank of Dana for \$320, and that on

presentation payment was refused and check duly protested, wherefore judgment is demanded for said sum of \$320, with interest and expenses of protest. For answer defendant admits making the check, and says it was made and delivered as part of an offer by him for the purchase of a tract of land from plaintiff, but that plaintiff refused said offer and demanded that defendant take the land on other and different terms than he had proposed or offered; that he (defendant) refused said demand and refused to make the purchase on the terms so prescribed, with the result that no contract or agreement was ever in fact made, and he became entitled to a return of his check, on which there is not and never has been anything due the plaintiff. In reply, the plaintiff avers that a valid contract of purchase was entered into, that it accepted the defendant's offer for the lands, and is able, ready, and willing to fulfill said agreement on its part.

The facts, as developed by an examination of the record, are, substantially, as follows: The defendant visited the state of Wyoming, and there had some talk with the plaintiff concerning the purchase of a certain tract of land. The negotiations then had between them resulted in the signing and delivering by defendant to plaintiff of a written application or offer in the following form:

The Federal Land & Securities Company. Application for Land. I, the undersigned, hereby apply to purchase the N. E. quarter of section 27, township 13, range 61, county of Laramie, Wyoming, containing one hundred and sixty acres (subject to legal public roads and mineral rights as reserved by the Union Pacific Railroad Company), for which I agree to pay \$2,000 as follows, \$320 in cash, \$160 March 1, 1909, and the balance to be paid on the crop payment plan. All deferred payments to draw interest from the date of this application, at the rate of six per cent. per annum, payable annually. Make papers in the name of J. W. Hatch, county of Greene, state of Iowa. Post office address, Dana, Iowa. July 30, 1908.

J. W. Hatch. This application is taken subject to approval of the board of directors of the Federal Land & Securities Company.

With this application he made and delivered to the plaintiff the check now in suit, and returned to his home in Iowa with the understanding between the parties that, if the offer was accepted, a formal written contract upon the proposed terms would be prepared by plaintiff and forwarded by mail to the bank at Dana, where it could be examined and executed by the defendant. It is the claim of plaintiff that the offer was in fact accepted immediately, and before defendant left Wyoming, but the evidence does not bear out the assertion. Thereafter plaintiff did prepare the draft or form of contract in alleged conformity with the proposed terms and forwarded it to the bank. Upon notice of such action, defendant visited the bank, examined the contract so tendered him, and refused to accept or execute it, and directed the bank to refuse payment of the check. This refusal was based upon the claim that the contract so demanded of him was not the one he had offered or proposed to make, but differed therefrom in many material respects. Whether this contention on defendant's part is sustained by the record is the decisive question in the case. It will be observed that the application or offer to purchase is directed to the Federal Land & Securities Company, and the proposition is to purchase the land at the price of \$2,000, of which \$320 would be paid in advance, \$160 on March 1, 1909, and the remainder on "the crop payment plan." The paper prepared by the plaintiff as embodying its conception of the contract is a very elaborate affair, entering into a great variety of detail, and filling more than six printed pages of the record. It purports to be a contract between the defendant as purchaser, and one C. H. Ainley of California, as seller. The following are a few illustrative examples of the stipulations to which

it required the defendant's assent: (a) To cultivate and seed, in certain named crops, a given number of acres of land each year; (b) to deliver one-half of such crop each year to said Ainley at the nearest market; (c) to give the seller a lien on all crops raised; (d) to neither sell nor mortgage his own share of the crop until he had delivered the seller's share and received his written receipt therefor; (e) to make no assignment, sale, or pledge of the premises or of the contract without the written consent of the seller; (f) to make time the essence of the contract to empower the seller to declare a forfeiture thereof on failure to perform any stipulation of the agreement, and that in such case all payments made and all improvements placed upon the land should be forfeited to the seller.

A glance at these papers discloses that, aside from a reference in the first to two cash payments and to a wholly undefined "crop plan" (from which we may perhaps

1. CONTRACTS
FOR THE SALE
OF REAL ES-
TATE: offer
to purchase:
terms of
acceptance.

infer that the parties expected to agree upon terms enabling the defendant to pay the remainder of the purchase price by delivering to the plaintiff some share or all of the crops raised on the land), there is not in the written proposal the slightest hint or suggestion of the multitudinous conditions in the form of contract which plaintiff prepared and submitted for the signature of defendant. Even if it should be conceded (which cannot well be done) that the expression "crop payment plan" is sufficiently definite to cover the plan of crop payments set out in the proposed contract, it contains not a word to indicate any purpose on the part of defendant to surrender or limit his right to sell and otherwise exercise the ordinary privileges of ownership over his own share of the produce; or to deny himself the right to dispose of his interest in the land except upon consent of the seller; or to impose upon his contract rights the liability to forfeiture and risk the loss of all payments and improvements if by any chance

there should be a default in the performance of a single item of his agreement. When, therefore, the plaintiff presented a contract containing these and many other wholly new stipulations in no manner mentioned or foreshadowed in the defendant's offer of purchase, the latter was manifestly within his right in refusing to honor the check which accompanied the offer. To convert an offer of purchase into a contract of purchase, the acceptance must be of the very terms proposed, and if the seller undertakes to qualify his acceptance, or to impose upon the buyer additional terms or conditions, there is no contract which either may enforce, for the minds of the parties have never met. *Baker v. Johnson County*, 37 Iowa, 186; *Batie v. Allison*, 77 Iowa, 313; *Stennett v. Bank*, 112 Iowa, 273.

It is argued, however, that, even though defendant was justified in refusing to execute the writing, the original paper constitutes a complete contract of purchase,

2. SAME: acceptance and approval of offer to purchase. and was therefore a sufficient consideration for the check in suit. But very manifestly this is not the case. In the first place, the

language of the instrument admits of no other construction than that of a mere offer, and contains an express declaration by which it was to be submitted to the approval of a "board of directors." The plaintiff's witness Beatty, one of its board of directors, undertakes to say in a general way that the application was "approved," not by the board of directors, but by an executive committee of such board. Moreover, his statement to that effect is a mere conclusion; no fact from which the court could properly find an acceptance being shown.

Nor was there any notice to defendant of the alleged acceptance, unless we are to treat as such the plaintiff's letters to him giving notice that the form of contract had been sent to the bank and demanding that he execute it and proceed with the purchase on the terms and conditions therein named, which terms and conditions plain-

tiff insisted were in strict accord with the application—a position which as we have seen is clearly untenable.

Not only the language of the application, but the words, acts, and conduct of the parties, as shown, without substantial dispute demonstrate that both parties expected

3. SAME: when
a contract
becomes
binding.

and intended that if the offer was accepted a formal written contract should be executed, in which the details of the transaction should be agreed upon and the obligations of both parties definitely fixed. Now, while it is true, as appellee argues, that a binding contract for the purchase of land may exist, if such be the intention of the parties, even where there is an understanding or expectation that a further and more formal writing shall be executed, yet this is the case only where the terms have been definitely settled in other writings, memoranda, or correspondence, or have been settled by oral agreement which in some manner has been taken out of the statute of frauds. The leading case cited by appellee, *Sanders v. Pottlitzer*, 144 N. Y. 209 (39 N. E. 75, 29 L. R. A. 431, 43 Am. St. Rep. 757), states the limits of the rule. It was there found that by correspondence the parties had settled all the terms and conditions upon which a purchase of property was to be made, and, although it was intended to reduce it to more formal shape, they were held bound by the agreement. But in so holding the court is careful to say that, in such case, "neither party is entitled to insert in the paper any material condition not referred to in the correspondence." Where, however, it is a part of an understanding in which parties' minds have met upon the terms of a sale that the agreement shall be reduced to writing and executed by both parties before entering upon its performance, it is the general rule that no contract is in fact effected until the writing is made and executed. *Weitz v. Ind. Dist.*, 79 Iowa, 427; *Glass Works v. Barnes*, 86 Hun, 374 (33 N. Y. Supp. 508); *Sparks v. Pittsburg Co.*, 159 Pa. 295

(28 Atl. 152); *Bourne v. Shapleigh*, 9 Mo. App. 64; *Gullich v. Alford*, 61 Miss. 224.

The fact, too, that the first writing in this case is uncertain and indefinite, as to some material terms, is a strong indication that it was considered as a mere preliminary to a contract in which these matters should be adjusted and agreed upon.
4. ~~SAME.~~ See, in point, *Methudy v. Ross*, 81 Mo. 481. Where neither the offer nor the acceptance settle certain necessary details, and where it is understood that a written contract shall be made embodying such matters, there is no contract until such writing be executed. *Jersey City v. Brown*, 32 N. J. Law, 504; *Bryant v. Ondrak*, 87 Hun, 477 (34 N. Y. Supp. 384). This, as we view the facts, is precisely the situation of the parties to this case, and that no enforceable contract was ever made between them.

There is still another feature of the case having a substantial bearing upon the rights of the parties. The application or offer was made by the defendant to the corporation, the Federal Land & Securities Company. The so-called "acceptance" was by that corporation; but it tenders to defendant and insists upon his accepting a contract of sale from C. H. Ainley, of whom, so far as appears from the record of the prior negotiation, no mention had ever before been made between them. Upon the face of the facts disclosed, defendant was dealing with the plaintiff alone, and the latter could not require him to enter into contract relations with a third person unless he chose to do so.
5. ~~SAME: ac-~~
~~ceptance by~~
~~a third~~
~~party.~~

Without pursuing the discussion further, we have to say that we are satisfied that, under the conceded facts, plaintiff should not be permitted to recover upon the check, and that a cancellation of said instrument should have been decreed as prayed by the defendant.

The decree appealed from is therefore reversed. Decree accordingly may be entered in this court within thirty

days at the election of the defendant. Otherwise cause will be remanded to the district court for decree in harmony with this opinion.—*Reversed.*

W. B. WAYT & SON v. MARY MEIGHEN, Appellant.

Sales: JUSTICE OF THE PEACE: JURISDICTION: VALUE. The defendant in this action, a resident of one county, ordered goods of plaintiff, a resident of another county, for which he agreed to pay a certain sum on delivery or give an approved note due one year, payable at the county of the seller, and containing a stipulation for attorney's fees and the jurisdiction of any justice of the peace. As by the terms of the agreement the defendant did not undertake to pay money or execute the note at the county of the seller, an action upon the contract could not be maintained before a justice of the county in which the seller resided.

Sales: PLACE OF PAYMENT. Where a promise is made to pay a stipulated price for goods on delivery of the same at a specified place the law will imply a promise to pay at that place.

Justice of the peace: JURISDICTION. Jurisdiction of a justice in an action for the breach of a contract to deliver goods at a specified place is not conferred by an implied promise to pay therefore at such place.

Appeal from Sac District Court.—Hon. F. M. POWERS, Judge.

SATURDAY, APRIL 9, 1910.

THE defendant appeals from the ruling of the district court reversing a judgment of dismissal for want of jurisdiction entered by the justice of the peace.—*Reversed.*

Edson & Moulton, for appellant.

R. L. McCord, for appellee.

LADD, J.—On April 7, 1908, the defendant, a resident of Buena Vista County, executed an order for a monument to be "delivered at Newell Cemetery about July or as soon as convenient thereafter, for which I agree to pay (\$285) two hundred and eighty-five dollars, on delivery or give approved note due one year payable at Sac City, Iowa, and attorney fees if action is commenced. I also agree to furnish material for foundation if I have one put in. It is agreed that any justice of the peace may have jurisdiction on this order." Notice claiming of her the purchase price "as justly due them on your contract," and requiring her to appear before J. W. Nutter, a justice of the peace in Jackson Township, in Sac County, was served on defendant, and on the return day, November 30, 1908, she appeared and moved that the action be dismissed for want of jurisdiction. The cause was transferred to the justice court of W. Jackson, by whom the motion to dismiss was sustained. A writ of error to the district court was sued out, and by it the ruling and dismissal of the justice reversed.

As the action was begun in a county other than that of defendant's residence, the justice's court was without jurisdiction, unless this was conferred in pursuance of section 4481 of the Code, which reads: "On written contracts stipulating for payment at a particular place, action may be brought in the township where the payment was agreed to be made." *Porter v. Welsh*, 117 Iowa, 144; *Baily v. Birkhofer*, 123 Iowa, 59. Section 3496 of the Code, in the chapter relating to the venue of actions generally, provides that, "when by its terms a written contract is to be performed in a particular place, action for a breach thereof may, except as otherwise provided, be brought in the county wherein such place is situated." The effect of the statute first quoted is to make the last applicable to the courts of justices of the peace by indicating the township in which suit shall be brought, so that

decisions construing or applying the one are controlling as to the other. The promise of defendant was to pay on delivery or execute a note. This was optional with her, and, in passing on the issue presented, it may be assumed that she did neither. Were the promise merely to pay a stipulated price on delivery of the monument at a specified place, the law would imply a promise to pay for it there, but this, not being expressed in terms as exacted by the statute, would not be effectual in conferring jurisdiction. *Hunt v. Bratt*, 23 Iowa, 171; *Manley v. Wolf*, 24 Iowa, 141; *Moyres v. Council Bluffs Nursery Co.*, 125 Iowa, 673; *Ft. Dodge Coal Company v. Willis*, 71 Iowa, 152. These cases are to be distinguished from those where the purchasers agree to receive or accept at the place of delivery, for in the latter the gist of the action is the breach of the understanding to perform at a specified place. *Haugen & Co. v. McCarthey*, 34 Iowa, 415. The feature of the contract essential to jurisdiction is the written undertaking, in terms not by implication, to perform at a specified locality. By the terms of the contract, defendant promised "to pay two hundred and eighty-five dollars, on delivery or to give approved note due one year, payable at Sac City, Iowa."

Appellee argues that, inasmuch as "payable" has reference to the indebtedness, it should be held to relate back to the consideration, but the language of the instrument does not warrant that construction. Plainly enough, the payment if in cash was to be made on delivery. By this was meant on the occasion or time of delivery at the cemetery, but, at defendant's option, she might execute a note provided (1) it be approved, (2) be made payable at Sac City, (3) due in one year, and (4) it stipulate for attorney fees in event of suit thereon. As defendant did not undertake to pay in money at Sac City, jurisdiction of the justice in Sac County necessarily depended on the stipulation with respect to the execution of the note. As

this was optional, she can not be said to have undertaken to bind herself in that manner. Conceding, however, that she did agree to execute a note, such as described, she did not undertake to do so at Sac City. The place of doing that was not specified, and therefore performance by paying money or executing the note was by fair implication to be at the cemetery, the locality of which is not disclosed by the record. In any event, the contract does not exact its performance in a county other than that of defendant's residence. It must be borne in mind that the suit necessarily rests on the breach of contract in failing to execute the note, and not on the breach of the conditions to be incorporated in the note when executed. This seems to have been overlooked in *Parr v. McGown* (Texas App.), 98 S. W. 950. In *Bradley v. Palen*, 78 Iowa, 126, the decision was that the venue was rightly laid, for that Palen had promised to "settle by note at Algona, Iowa," where the action was brought. As there was no breach of any obligation to be performed in a county other than that of defendant's residence, the justice's court in Sac County was without jurisdiction.—*Reversed.*

HENRY LOXTERCAMP, Appellee, v. LININGER IMPLEMENT COMPANY, Appellant.

Sales: IMPLIED WARRANTY. Where a dealer undertakes to furnish an article to fill an order from one who buys for resale, a warranty is implied that it is of merchantable quality; and this ordinarily means, in the case of a manufactured article, that it is of good material, well made and reasonably fitted for the use for which it is constructed and furnished.

Same: EXPRESS WARRANTY: MERGER OF IMPLIED WARRANTY. The provision in a written order for a farm implement from a wholesale dealer, that the implement is subject to the warranties published in the catalogue of the manufacturer, if constituting an express warranty on the part of anyone, it is the warranty of

the wholesaler rather than that of the manufacturer, and is not necessarily inconsistent with an implied warranty, or to be taken as expressing the entire agreement.

Same: **APPEAL: CHANGE OF THEORY.** One who has induced a holding of the trial court that a contract of sale did not amount to an express warranty, can not, on appeal, escape liability for breach of implied warranty on the ground that the same was merged in the express warranty.

Warranties: EXPRESS AND IMPLIED. A written contract of sale and warranty will not of necessity deprive the buyer of the benefit of an implied warranty.

Same: BREACH OF WARRANTY: INSPECTION BY PURCHASER: WAIVER OF DEFECTS. One who purchases with an implied warranty an article of machinery, the real character and quality of which can only be determined by actual use, does not lose the benefit of his warranty by a failure to discover latent defects until the machine is put to the actual use for which intended.

Same. The duty of inspecting an article purchased only applies where the buyer undertakes to rescind the purchase; it can not be urged in an independent action to recover damages for breach of an alleged implied warranty.

Same: BREACH OF WARRANTY: MEASURE OF DAMAGES. Although a purchaser of machinery for resale under an implied warranty pleads a loss of resale and consequent loss of profit because of a breach of the warranty, yet, if he also alleges that by reason of its defective condition the machine was wholly unsalable, useless and without value, he is not limited in his recovery to a loss of profits from the resale, but may recover the difference between the reasonable value of the machine had it been in merchantable condition as warranted, and its value in the actual condition in which it was delivered.

Exclusion of evidence: HARMLESS ERROR. A party can not complain of the exclusion of evidence which is subsequently admitted.

Appeal from Carroll District Court.—HON. F. M. POWERS, Judge.

SATURDAY, APRIL 9, 1910.

ACTION at law to recover damages for breach of an

alleged implied warranty of a manure spreader. Judgment for plaintiff, and defendant appeals.—*Affirmed.*

B. I. Salinger and L. H. Salinger, for appellant.

Lee & Robb, for appellee.

WEAVER, J.—At the date of the transaction under inquiry the plaintiff was a retail dealer in farm implements at Carroll, Iowa, and the defendant a wholesale dealer at Omaha, Neb., in like merchandise, including the Kemp manure spreader, manufactured by a concern known as the Richardson Manufacturing Company at Worcester, Mass. Plaintiff gave defendant a written or printed order for a Kemp spreader, in which the only reference to a warranty or representation of quality is in the following words: “We agree to receive the following mentioned below and settle for the same on arrival by notes due as per terms marked below. . . . All goods subject to the warranties published in factory’s catalogue and circulars.” There is evidence to the effect that the Richardson Manufacturing Company in its advertising literature described the virtues and triumphs of the Kemp spreader in the following terms: “The Worcester Kemp manure spreader has had nearly thirty years of this field experience. Every part has been demonstrated in actual field work; it is strong, simple and mechanically right. It does its work with a certainty that is not disturbed by any possible local conditions. The Worcester Kemp is well built in every detail. Every particle of material has its office to perform, and forms its part of the magnificent whole.” The machine was shipped to plaintiff, who, after having it in store for a time, made a tentative sale thereof to one Schwaller for use on a farm. On being tested by Schwaller, it proved to be incapable of doing good work, and was returned to the plaintiff, who, after

unsuccessful appeals first to the defendant and later to the Richardson Company to remedy the defects, brought this action for damages, declaring both upon a breach of a written warranty and a breach of an implied warranty of fitness. The defendant answered, admitting the sale of the machine to plaintiff, but denying that it gave the plaintiff any warranty, express or implied, concerning said machine, and alleging that "whatever warranties, express or implied, were made, if any were made, were not those of the defendant but of the makers of the machine in controversy;" and it further avers that, if any implied warranty did or could have arisen from the sale to plaintiff, yet as it is conceded that such sale was made to him for the purpose of resale, and as he had the machine in his possession for a period reasonably sufficient to enable him to inspect it and ascertain its quality before selling to Schwaller, the office of such warranty had been accomplished, and no action would thereafter lie against defendant for its breach.

At the close of the testimony, the trial court withdrew from the jury the issue upon the alleged express warranty, but submitted the case for a verdict upon the alleged breach of an implied warranty. On this question it instructed the jury in substance that if the machine was ordered for the purpose of resale, and at the time of such order plaintiff had no opportunity to inspect and ascertain the quality of such spreader, the law would imply a warranty that it was reasonably fit for the purpose for which it was designed, and was in a merchantable condition, and that, if on a reasonable trial it proved to be materially defective in the respects named, plaintiff was entitled to recover his damages so sustained. The jury found for the plaintiff.

Stated in brief terms, the position of appellant is that under the circumstances of this case there was no implied warranty in the sale of the machine; or, if such

implication did arise, it was fully satisfied and discharged when plaintiff had held it in possession a sufficient time for inspection of its quality and character before making a resale. Was there an implied warranty? We do not understand counsel to deny the proposition that, generally speaking, in an executory contract for sale of personal property when the thing sold is not present for inspection and delivery, or where a dealer undertakes to furnish an article to fill the order of one who buys for resale or for any other known or specified use, a warranty is implied that it is of merchantable quality, and this is ordinarily held to mean or include an assurance that such article (if a product of manufacture) is well made, of good material, and reasonably well fitted for the uses for which it is constructed or furnished. *Davis v. Sweeney*, 75 Iowa, 45; *Russell v. Critchfield*, 75 Iowa, 69; *Blackmore v. Fairbanks*, 79 Iowa, 282; *Checkrower Co. v. Bradley*, 105 Iowa, 537; *Parsons v. Mallinger*, 122 Iowa, 703; *Bank v. Dutcher*, 128 Iowa, 413. In some states the rule may be somewhat narrower than is here stated, but it is too well settled in our own jurisdiction to admit of question.

It is argued, however, that the terms of the written order are such as to exclude any implication of warranty. This position is grounded on the clause, "all goods subject

2. SAME:
express
warranty;
merger of
implied
warranty.

to the warranties contained in the factory's catalogues and circulars." It is said, in substance, that here is an express written warranty which includes all the terms and liabilities which in any case could arise from an implied warranty, and therefore under the rule of *Bucy v. Pitts*, 89 Iowa, 464, the implied warranty must be considered as merged in the writing, and the latter be taken as expressing the entire agreement. At the same time it is strenuously insisted that the written warranty, so called, is not the agreement, representation, or warranty of the

defendant, but of the "factory" which made the machine, which was in no manner a party to the contract of sale in controversy, and is not a party to this action. This defense appears to us to be untenable. To give the clause referred to any reasonable construction or effect as an express warranty by any person would require us to say that the appellant thereby adopted as its own warranty the representations, if any, found in the publications of the manufacturer. It could not reasonably be said that the appellee was buying upon a warranty to him by the Richardson Manufacturing Company, for that company was a stranger to the transaction. If there be any warranty expressed in the writing, it must be that of the appellee, who alone was filling the order.

But defendant denies that the language constituted an express warranty on its part, and, having succeeded in inducing the trial court to so hold, it
3. SAME: appeal:
change of theory.
can not be permitted in this court to escape liability on the ground that its implied warranty has been merged in an express warranty which it never gave.

Moreover, even if it should be held that this writing contains an express warranty, we are not prepared to say that it is such as excludes the idea of an implied war-

ranty. Though such is not the universal
4. WARRANTIES:
express and implied.
holding, it is the rule in this state that a written contract of sale and written warranty do not necessarily deprive the buyer of the benefit of an implied warranty. *Bucy v. Pitts*, 89 Iowa, 464; *Checkrower Co. v. Bradley*, 105 Iowa, 537; *Heating Co. v. Kramer*, 127 Iowa, 142. Our attention is directed to nothing in the writing which is inconsistent with the existence of an implied warranty.

It is further argued that plaintiff received and held the machine a sufficient length of time in which to inspect and reject it if found wanting, and can not now be heard

to claim a breach of the warranty. The record does not make a case for the application of the rule

5. **SAME:** breach
of warranty:
inspection by
purchaser:
waiver of
defects.

which counsel here invoke. It may be true (though that question is not now before us) that, had the alleged defects been of a patent character or such as were readily observable from an ordinary inspection, a retention of the machine beyond a reasonable time for such casual inspection would be a waiver of the right to claim a breach of the warranty; but it certainly is not the rule that one who purchases with an implied warranty a piece of farm machinery like a threshing machine, a windmill, a harvester, a manure spreader, or other article the real character and quality of which can be determined only by a test of actual practical use must lose the benefit of his warranty because he fails to discover concealed or latent defects until in the ordinary course of business he, or his customers, put the thing purchased to the use for which it is designed and sold.

Indeed, we think the duty of inspection upon receipt of the article purchased is applicable only to cases where the buyer undertakes to rescind his order or to exercise

6. **SAME.** the right to return the property to the seller.

He may, if he so elect, rest upon his right to damages for breach of the warranty and recoup therefor in an action against him for the purchase price, or he can maintain an independent action for damages, and in such proceeding it is immaterial that he did not inspect the article and ascertain the defects promptly upon its receipt. *Bushman v. Taylor*, 2 Ind. App. 12 (50 Am. St. Rep. 228); *Brigg v. Hilton*, 99 N. Y. 517 (3 N. E. 51, 52 Am. Rep. 63); *Bonnell v. Jacobs*, 36 Wis. 59.

Again, it is urged that the damages which the plaintiff was permitted to recover were for his loss of a resale to Schwaller and not the ordinary compensation allowable upon showing a breach of warranty, and this loss of a resale

could have been avoided by him had he exercised reasonable diligence to ascertain the defects of the machine. It is true that plaintiff pleads the alleged loss of a resale of the machine and a consequent loss of profits; but he does more and alleges that, by reason of its defective condition, the article was wholly unsalable, useless, and without value. The court, as was proper, instructed the jury that, if it found him entitled to a verdict, the measure of plaintiff's recovery was the difference between the reasonable value of the machine had it been in a merchantable condition as impliedly warranted and its value in the actual condition in which it was delivered. The fact of an attempted resale was important only as showing plaintiff's conduct with reference to the machine, and the sufficiency of the efforts he had made to test its merchantability and fitness for the work it was designed to perform. His recovery was not simply the loss of a sale of the machine, but for its failure to fill the measure of the warranty on which it was sold to him.

Error is assigned upon the alleged refusal of the court to admit evidence of an expert witness as to the meaning of the phrase "all goods subject to warranties published

in factory's catalogues and circulars." While it appears that the court at first sustained plaintiff's objections to this line of evidence, the transcript shows that it finally yielded to counsel's persistence, and admitted the very matter which this assignment of error assumes was excluded. In view of this record, it is not easy to understand just why the ruling is pressed upon our attention as reversible error.

We find no reason for interfering with the judgment below, and it is *affirmed*.

W. A. KIRKPATRICK, Appellee, v. F. A. GREENLAND, ET AL.,
Appellant.

Cancellation of instruments: TRUSTS: QUIETING OF TITLE: EVIDENCE.

1 Where one in whose name title to property is taken furnished all or any definite part of the purchase price as his own and not by reason of an agreement with one claiming an adverse title, he is entitled to retain the same or have a resulting trust declared to the amount of the consideration which he furnished; but if on the other hand the party claiming adversely paid all or any part of the consideration personally, or by an arrangement with the holder of the legal title, he is entitled to have the deed set aside. In the instant case the plaintiff, seeking to cancel the deed in question, was an aged and ignorant man and the defendant, who held the legal title, was a man of affairs, and the evidence is held to show that the land deeded to defendant was paid for by plaintiff personally and by defendant in his behalf, and the plaintiff is entitled to have the deed set aside and title quieted in him.

Same: EVIDENCE. The fact that one claiming to be the owner of 2 property conveyed to another always had the possession of the same following the deed; that he made many payments therefor; paid the taxes and used the property as his own; that never until shortly before action to quiet title did the party holding the legal title claim the property under his deed; and that the parties agreed upon a division line or boundary between the land in question and that unquestionably owned by defendant, were strong circumstances to support plaintiff's claim of ownership in this action.

*Appeal from Decatur District Court.—Hon. H. K.
EVANS, Judge.*

SATURDAY, APRIL 9, 1910.

SUIT in equity to cancel and set aside a certain deed made by Joseph A. Brown and other defendants to defendant Greenland, and to quiet plaintiff's title to the

land covered thereby. Defendant Greenland denied plaintiff's title, and claimed that the land belonged to him because he paid the purchase price therefor. On the issues tendered, the trial court granted plaintiff the relief demanded, and defendant Greenland appeals.—*Affirmed.*

C. W. Hoffman and V. R. McGinnis, for appellant.

Geo. W. Baker and A. P. Olsen, for appellee.

DEEMER, C. J.—Some time in the year 1899 plaintiff entered into a written contract with the defendants, other than Greenland, for the purchase of the land in controversy, and to pay therefor the sum of \$500 in installments of \$100 each. One hundred dollars was paid at the time of the delivery of the contract, and the final \$100 was confessedly paid by defendant Greenland. He at that time had the contract, although it had never been assigned to him, and, when the final payment was made, defendants Brown and others executed and delivered a deed for the land to defendant Greenland. This deed was executed in April of the year 1902, and was filed for record some time during the same month. This action was commenced by plaintiff some time in April of the year 1904, and is to set aside the deed to Greenland and to establish and quiet plaintiff's title to the land. There is no doubt that the original contract was made by plaintiff for the purchase of the land, and he claims that he made all the payments save the last called for by the contract. He admits that the last payment was made by defendant Greenland, but he says that this payment was made for and on his behalf, for the reason that Greenland was then owing him more than the amount of the payment or all of the payments made by Greenland. He further says that he gave Greenland the contract without assignment shortly before the last payment was made in order that he, Green-

land, might settle with the vendors, and that Greenland was to take title to the land in his, plaintiff's name, and that he, plaintiff, did not know that Greenland had taken title in his own name until shortly before the commencement of this action. On the other hand, Grenland says that the land was purchased for his benefit, and, although the original contract therefor was made in plaintiff's name, he, Greenland, paid the entire purchase price, and was and is entitled to the land and to have his title thereto confirmed.

Appellant is relying, not only on the legal title, but upon an equitable one resulting, as is claimed, from his payment of the purchase price. On the other hand, plaintiff is relying upon his contract of purchase, his payment of part of the purchase price, and a further claim that, although Greenland may have in fact paid part of the purchase price, whatever payments he made were because he was indebted in the amount thereof, if not more, to plaintiff, because of property sold by plaintiff to said Greenland.

From this statement the exact question for solution is apparent. Of course, if defendant Greenland furnished all or any definite and specific part of the purchase price

1. CANCELLATION
OF INSTRU-
MENTS:
trusts:
quieting of
title:
evidence.

for the property, and the amount so furnished belonged to him, and was paid as his own, and not by reason of an arrangement with plaintiff, whereby the amount so furnished was loaned to plaintiff, or paid

because of a prior indebtedness to him, Greenland is entitled to sustain the deed which was given to him for the property, or have a resulting trust declared to the amount of the consideration furnished. If, on the other hand, plaintiff paid any part of the consideration for the property, he is entitled to protection in the amount so paid, and, if he paid all either personally or by an arrangement with defendant Greenland, he is entitled to have the deed set aside and his title quieted. Plaintiff

is an old and ignorant man, and defendant Greenland is a shrewd man of affairs. He, defendant, had plaintiff's confidence, and he undoubtedly received much property from plaintiff. Whether or not he paid for it as received or at any other time is a question of grave doubt. The purchase of the property was made by plaintiff in his own name, and beyond all doubt he made the first payment from his own means. He also paid all the taxes on the property save for a single year, and for this year defendant Greenland made the payment, but he did this in plaintiff's name. Plaintiff was in possession of the property under the contract, and has retained that possession down to the present time. He also leased a part of it from time to time, and received the rentals therefrom.

After the purchase, defendant Greenland purchased an adjoining tract, and a dispute arose regarding the division line between the two tracts. A survey was had,

^{a. SAME:} and fences were changed so as to accord evidence. with the line so established. There is also testimony to the effect that plaintiff for many years had sold all or practically all the stock raised by him upon the lands in controversy and other lands to the defendant Greenland, and that no settlement has ever been had between them. It is further shown that defendant Greenland paid many of plaintiff's debts, because he, defendant, was owing plaintiff for property received. There can be no doubt under the testimony that plaintiff himself made most of the payments on the land, and that he also paid the taxes. The fact that plaintiff has always been in the possession of the land; that he made many of the payments therefor; that he paid the taxes thereon, and used the property as his own; that until shortly before the bringing of this suit defendant Greenland made no claim to the property under his deed; and that the parties agreed to a division or boundary line between the land in controversy and that owned by defendant Green-

land—are strong circumstances in support of plaintiff's claim.

Moreover, the trial court had the parties and witnesses before him, and in an opinion filed indicated that some of the witnesses introduced by defendant were unworthy of belief because of their appearance and conduct. In view of this situation, some importance should be attached to the finding of the lower court.

Upon the whole record we are satisfied with the decree as rendered, and it is *affirmed*.

' E. V. TUTTLE, Plaintiff, v. J. POCKERT, EMMA POCKERT
and certain premises, Appellants.

Intoxicating liquors: INJUNCTION: EVIDENCE BY DEPOSITIONS. The defendant in an action to enjoin the illegal sale of intoxicating liquors is not entitled as a matter of right to present his evidence in the form of depositions; as such right, if it existed, would generally result in postponing the trial over at least one term, which would violate the statutory provision that the action shall be triable at the first term after the service of notice.

Same: CONSTITUTIONAL LAW. The section of the constitution providing that the Supreme Court shall have appellate jurisdiction only in cases in chancery, and shall constitute a court for the correction of errors of law under rules prescribed by the General Assembly, does not provide that actions triable *de novo* shall be upon depositions; and hence, the defendant in a proceeding to enjoin the illegal sale of liquor is not entitled to present his evidence by depositions. And having no constitutional right to present his evidence by depositions, he is not entitled to a continuance of the temporary application for an injunction for the purpose of so presenting his evidence.

*Appeal from Carroll District Court.—Hon. F. M.
POWERS, Judge.*

SATURDAY, APRIL 9, 1910.

ACTION in equity to enjoin the defendants from the illegal sale of intoxicating liquors. The defendants appeal from an order granting a temporary writ.—*Affirmed.*

L. H. Salinger, for appellants.

M. S. Odle, for appellee.

SHERWIN, J.—The plaintiff alleged that the defendant J. Pockert kept on premises owned by the defendant Emma Pockert intoxicating liquors with the intent to sell the same, in violation of law. Both a temporary and a permanent writ were asked. The defendants answered, and thereafter filed a motion for a continuance for the purpose of presenting their evidence in the form of depositions. The court ordered a continuance as to the final hearing, but also ordered that a temporary writ issue as provided by law restraining the defendant J. Pockert from keeping and maintaining a nuisance by the unlawful sale of intoxicating liquors. The temporary writ was issued under the express authority of section 2405 of the Code, which says that, when the hearing of the application for an injunction is continued at the instance of the defendant, a temporary writ "shall be granted as a matter of course."

The appellants say that this statute is unconstitutional because it deprives a defendant in such a case of his "constitutional right to a review *de novo* on appeal, by taking a temporary writ of injunction against him as a penalty for taking time to secure depositions upon which to base such review; and section 2405 . . . is repugnant to the constitutional grant of chancery jurisdiction to the Supreme Court in permitting this." They further say that, even if said section is constitutional, it was error to issue a temporary writ in this instance because the hearing on the application for such temporary writ had

not been continued at the instance of the defendant. While the appellants' argument is devoted almost entirely to a consideration of the constitutionality of section 2405, the appellees make no reference to the subject in their argument, and we might well conclude that the point is conceded by them. But the interests of the public and our duty demand that we sustain the validity of the statute, if it should be sustained, notwithstanding the neglect of counsel or his mistaken view of the law.

The appellant claims that section 2405 is unconstitutional because it denies him the right to present his evidence in resistance to the application for a temporary writ by depositions, that such right inheres in the constitutional jurisdiction of this court, and that no statute can deny it. The fundamental difficulty with the appellant's claim is that it is based on an erroneous contention that he is and was entitled to present his evidence in the form of depositions on the final hearing. Section 2405 provides for the issuance of an injunction whenever it is made to appear to the court that a nuisance exists, as defined in the chapter relating to intoxicating liquors, and further provides that a temporary writ shall issue when certain conditions are present. Section 2406 provides as follows, in part: "The action when brought shall be triable at the first term of court after due and timely service of notice of the commencement thereof has been given." It is manifest that under this section a defendant is not entitled to present his evidence in the form of depositions as a matter of right, for the reason that, if such right exists, it would generally result in postponing the trial over at least one term, in direct violation of the requirement that the action shall be triable at the first term after due service has been made. Both of these sections of the statute are a part of the police regulations of the state for the suppression of the illegal traffic in intoxicating liquors; and, while the issuance of an injunc-

tion is provided for, the procedure is not governed by section 3652 of the Code, which relates to ordinary equitable actions; actions not a part of the police regulations relating to the sale of intoxicants.

Article 5, section 4, of the Constitution, does not itself provide that actions triable *de novo* in this court shall be tried on depositions. And, were it not so provided in section 3652, parties to an ordinary equitable action would have no right to a trial upon depositions. That they would have the right to have their evidence taken in writing so that a trial *de novo* might be had here is not questioned. But all the Constitution guarantees is that they shall have a trial *de novo* in this court under such procedure as may be prescribed by the Legislature. It is the right to such a trial that is important and that is preserved by the Constitution. The form of procedure is unimportant if such right be not thereby destroyed. *Sherwood v. Sherwood*, 44 Iowa, 192, and *Holbrook v. Fahey*, 51 Iowa, 406, relied upon by the appellant, are not controlling for the reason that the police power of the state was not involved in either.

If the appellant had no constitutional right to present his evidence in the form of depositions, it is manifest that he had no right to a continuance of the temporary application, for such continuance would have defeated the very purpose of the statute. Furthermore, the writ issued did no more than to restrain the appellant from violating the law pending a final hearing, and he appears here in the rather anomalous position of complaining of such restriction.

The order of the trial court is *affirmed*.

**DELLA M. CREVELING, Appellant, v. GEO. V. BROWN
ET AL.**

Evidence: COMMUNICATION WITH A DECEDENT. The statute relating 1 to personal communications with a decedent precludes an heir of decedent from testifying to communications with him tending to sustain a conveyance of property by decedent to such witness.

Gifts *inter vivos*: EVIDENCE. In this action to establish a gift of land 2 by deed, subsequent to the death of the grantor, the evidence is reviewed and held insufficient to show that the deed was intended to operate as a present delivery or as a consummation of the claimed gift.

Appeal from Decatur District Court.—Hon. H. K. EVANS,
Judge.

SATURDAY, APRIL 9, 1910.

PLAINTIFF appeals from decree dismissing her petition.—*Affirmed.*

B. M. Russell and C. W. Hoffman, for appellant.

W. B. Kelley and A. P. Olsen, for appellees.

LADD, J.—Prior to February 3, 1903, Susan Fowler owned eighty acres of land and other property. Owing to some trouble between herself and husband, Lewis Fowler, she had gone to the home of her niece, the plaintiff herein. While there, and on the day named, the latter alleged that Mrs. Fowler delivered to her a deed of the land, and afterwards requested her to withhold it from record. A few days later the Fowlers adjusted their dif-

ferences, and Susan returned to her husband. On April 28, 1903, they conveyed the land to defendant Geo. V. Brown for a consideration of \$4,500. Of this \$1,500 was paid in cash and a note for \$3,000 executed by the grantee to Mr. and Mrs. Fowler, secured by mortgage on the land. The record discloses that Brown was an innocent purchaser, so that no attention need be given to that portion of the petition praying that title to the land be quieted in plaintiff. The note and mortgage, however, remained unpaid, and plaintiff prayed the court to decree that the Fowlers in taking these be deemed to have done so in trust for plaintiff, and that the administrators of their respective estates be directed to turn the same over to plaintiff. The defense was in the nature of a general denial. Mrs. Fowler died June 9, 1906, and her husband August 25th of the same year, and this action was not begun until October 23, 1907.

That a deed in blank bearing date February 3, 1903, and describing the eighty acres, was signed by Mrs. Fowler and her husband, is not questioned. Was it so de-

livered as presently to pass title? This necessarily depends on the intention of the parties to the instrument. Plaintiff's husband testified: That about the date of the deed he saw Mrs. Fowler hand to his wife two deeds, saying: "Here is a deed to that house and lot and also a deed to the land. It is for you. I am going to give it to you, and that is the deed." And that plaintiff had retained possession of them since. Also, that about two or three weeks later Mrs. Fowler requested that the deeds be not recorded until after her death, adding that after her death everything was hers. He also testified that she had delivered the lease to the farm at the same time the deeds were turned over, and that subsequently he "straightened up the fences all around the farm." In answer to inquiries by counsel for defendants, plaintiff testified that she had

1. EVIDENCE:
communication with a
decedent.

inserted in the deed as consideration "\$4,500," as grantee, her own name and the name of the county and state, and that this was done in the presence of Mrs. Fowler and under her direction. Her statement that this was done under the grantor's direction was not responsive to the question, and possibly the motion to strike should be sustained on this ground. But, as that done was in Mrs. Fowler's presence, the fair inference is that it was with her consent. Aside from this, there was no direct evidence concerning the deed, save that of John Zimmerman, who testified to a conversation with Susan Fowler shortly after the date of the deed. As he was an heir (being a nephew), he was incompetent to testify to any communication between himself and deceased. Section 4604, Code. But there was evidence on the one hand that Mrs. Fowler had expressed an intention to leave all her property to plaintiff, who had lived with her from early childhood until her marriage, and, on the other, that she had stated that she had given her all she was entitled to.

But for other circumstances in the record such evidence together with possession of the deed, notwithstanding the recital of a consideration therein, might be regarded as sufficient to pass title by gift.

2. Gifts inter vivos: evidence.

But subsequent events are absolutely inconsistent with such a purpose on the part of either grantor or grantee. Within two months subsequent to the date of the deed the land was conveyed to Brown. Plaintiff knew of this shortly afterwards, and, although living within a half mile of the land, interposed no objection whatever to the transaction either to the purchaser, who went into possession March 1, 1904, or to Mrs. Fowler, nor did she make any claim to the purchase price. She did not record the deed until August 23, 1907, more than a year after the death of Mrs. Fowler and after the time for filing claims had elapsed, and nearly a year after that of Fowler. About two weeks prior to the death

of the former, neighbors at the instance of the latter informed her that, if she would care for Mrs. Fowler, he would sign over to her all his interests in his wife's property, but she at first refused, and then expressed doubt as to whether he would do so, without alluding to any claim that she had conveyances thereto. To a Miss Lewis she said immediately after her aunt's funeral that she had not been given anything, though she explained that she then supposed Fowler had gotten everything from her aunt. Not until the filing of her petition on October 22, 1907, more than four and one-half years subsequent to the transaction and after the other parties thereto had departed this life, did she assert any claim directly or indirectly to the land. It is impossible to reconcile these circumstances with a purpose on the part of either party to the deed that passing of the deed should operate as a present delivery. The more reasonable inference and one in harmony with the evidence is that, even though the deed was put in the manual possession of plaintiff, it was not to be effective in passing title until the grantor's death. Creveling testified to a request not to record until then, and the conduct of the parties to the instrument can not be explained on any other theory. Had the grantee therein treated this as a delivery, a different question would arise. See *Creveling v. Banta*, 138 Iowa, 47. She did not do so, however, but with decedent proceeded on the theory that the gift would not become effective until the death of the grantor. Not having divested herself of title or dominion over the property, Mrs. Fowler might revoke what she had done and convey the land to another. In other words, as what was done in view of the intention of the parties as manifested by their conduct did not amount to a present delivery of the deed, the gift was not consummated, and the court rightly held that title did not pass to the grantee named therein.—*Affirmed.*

RACHEL BAKER, Appellant, v. BELLE SYFRITT and others,
Appellees.

Wills: JOINT OR MUTUAL INSTRUMENTS: VALIDITY: PROBATE. The joint or mutual character of a will does not in itself affect its validity, and if otherwise valid it may be probated and enforced as the will of the testator dying first, or as the separate will of each, or as the joint and mutual will of both, according to its nature and terms; and where such a will is reciprocal merely its probate as the will of the first deceased is usually all that is necessary to accomplish the intended purpose.

Same: PROBATE OF JOINT WILLS. Where the makers of a joint will own and hold the property devised in severalty only, the instrument may well be treated as the individual devise of each and successively probated as such; but where the property is owned jointly it has been held that while the instrument may be probated as the separate will of each, it is proper to await the death of the survivor and then probate it as the joint will of both.

Same: AGREEMENT TO MAKE WILL: JOINT OWNERSHIP. A will is not a contract, yet the terms and benefits thereof may be the subject of contract; so that where a husband and wife dispose of property held by them in severalty by a joint will, and in so doing declare in express terms that they are in fact joint owners thereof, the court will treat the property, on the assumption that it represents the fruit of their joint labors, as being a common estate at the date of the will.

Joint or mutual wills: REVOCATION. Where two persons competent to make a testamentary disposition of their property enter into a contract by which they unite in devising their joint or several estates to a designated third person, subject to a life estate in the surviving testator, and upon the death of one the survivor avails himself of the benefits of the will in his favor, he can not thereafter revoke the will but will be treated as holding the property in trust for the purpose indicated in the compact.

Same: RELINQUISHMENT OF DOWER. A husband and wife may agree to unite their separate estates in the creation of a trust for the benefit of a third person, who shall come into the legal title and right on the death of the surviving testator; and where they exe-

cute a joint instrument clearly expressing such purpose, it will be treated as a relinquishment of any dower right in the property, whether termed a contract, will or conveyance. And where the will, as in this case, provided that the surviving testator should hold the same for life, and as such survivor the husband probated the same and enjoyed the benefits arising therefrom, he took simply a life estate, and a remarriage did not reinvest him with a heritable estate, in which his widow by the subsequent marriage could acquire a dower interest.

Appeal from Pottawattamie District Court.—Hon. A. B. THORNELL, Judge.

SATURDAY, APRIL 9, 1910.

ACTION in equity for the partition of real estate. The cause was submitted and decided upon the pleadings filed and a statement of agreed facts. Decree for defendants, and plaintiff appeals.—*Affirmed.*

Kimball & Peterson for appellant.

W. S. Baird and McKenzie & Howell for appellees.

WEAVER, J.—On September 21, 1889, John Baker and Harriet Baker were husband and wife, residing in Council Bluffs, Iowa. There were no children of this union, but the wife had children by a former marriage. John Baker then held in his own name the legal title to forty acres of land and to the homestead property occupied by them, while the wife held in her own name the legal title to another forty acre tract. They were well advanced in age, and on the day named united in the execution of a joint will. It is drawn in formal terms, and, omitting provisions not directly involved in this controversy, its three principal paragraphs are as follows:

Item First. All our property being held by us jointly,

share and share alike, both real and personal, it is our wish that the one of us surviving shall hold the same and have the use and benefits thereof, and rents and profits arising therefrom, during the period of his or her natural life, and it is accordingly by us so bequeathed and devised unto the survivor of us during the period of the survivor's natural life. . . .

Item Third. After the death of the survivor of us, as aforesaid, it is our wish that the property on McPherson Avenue, in the city of Council Bluffs, Iowa, more particularly described as a part of lot 2 in subdivision of southeast quarter of northeast quarter of section 30, township 75 N., range 43 west, which is the homestead on which we now reside, together with building adjoining, should become the property of Belle Syfritt, of Kansas City, Missouri, daughter of our niece, Belle Burton, during her life, and we do therefore devise the property aforesaid to her, the said Belle Syfritt, for her use and benefit during the period of her natural life with remainder at her death to her children. If she die without issue surviving her, then remainder to our residuary legatees hereinafter named. . . .

Item Sixth. After the death of the survivor of us, and after the payment of our debts and after the payment of the two bequests above set forth, it is our wish that the rest, residue and remainder of our estate, real and personal, left thereafter, shall descend and rest in our beloved children W. J. Westrip, J. H. Westrip and F. G. Westrip of Council Bluffs, Iowa, share and share alike in fee simple and we do so devise and bequeath the same.

Harriet Baker died in November, 1900, and soon thereafter her husband caused the joint writing above mentioned to be probated as her last will and testament, and was appointed administrator with will annexed to her estate. He took and held the possession and enjoyed the use, rents, and profits of all the property and estate left by his said wife, and continued therein during the remainder of his life. He appears to have made no objection to the will, or to any of the provisions thereof, nor did he ever file a statement of his consent thereto or an election to take

under the will, unless the filing of the joint will with his signature thereto may be construed as such consent. No notice to make an election was ever served on him. In July, 1901, he married the plaintiff herein, Rachel Baker, and in February, 1908, died. He made no other will than was contained in the joint instrument above mentioned, and this was duly admitted to probate as his last will and testament.

The petition herein alleged that John Baker died seised of the forty acre tract and homestead property of which he held the legal title, and of an undivided one-third interest in the forty acres of which his former wife held the title, and that plaintiff as his surviving widow is now entitled to have set off to her one-third in value of all said property. To this proceeding she makes the heirs of John Baker and Harriet Baker and the beneficiaries under their joint will parties defendant, and asks to have the property partitioned accordingly. The defendants answer, denying that at the time of his marriage to plaintiff, or at any time thereafter, John Baker owned any right or interest in the real estate mentioned in which plaintiff obtained, or could obtain, a right of dower or right to a distributive share after his death. They pleaded the making of the joint will, the probating thereof at the instance of John Baker, and allege that by filing said joint instrument with his own signature thereto, and without objecting thereto or repudiating its terms, he consented to take under said will. They further allege and claim that, while testamentary in form and in some of its effects, said joint instrument constituted a valid contract between the husband and wife for the present transfer of their common estate to the beneficiaries named therein, reserving to themselves and to the survivor of them a life estate in all said property, and that upon the death of Harriet Baker and the probate of her will without objection made thereto by the said John Baker, and his acceptance of the benefits of the provision

thereof made in his favor, said contract became irrevocable, and that thereafter he could not make any valid conveyance or devise inconsistent with said will, nor could he by marriage with plaintiff confer upon her any interest in said property or estate which would defeat in whole or in part the terms of said contract. It is further alleged that by virtue of said contract between the husband and wife, and by the acceptance by said husband of the benefits thereof after the death of the wife, all of said property became and was in his hands a trust fund for his use during his life, and for the preservation of the principal thereof for the benefit of the named beneficiaries at his death, and that said trust was in fact accepted and performed by him. Plaintiff took issue by reply to the affirmative matters set up in the answer. The court held with the defendants upon the law of the case, and plaintiff appeals.

It will be observed that the pleadings state much in the nature of mere legal conclusions, but as it serves to make clear the position taken by the respective parties, we have

i. WILLS: joint or mutual instruments: validity: probate. set them forth with some degree of particularity. The question thus presented is a novel one in this jurisdiction, and the industry of counsel on either side has not been fruitful in the discovery of many precedents directly in point. The subject of joint and mutual wills has been quite frequently before the courts, and while there have been some decisions and more frequent *dicta* to the effect that such an instrument is unknown to the law, the greater weight of authority and the better reason is with the view that the joint or mutual character does not of itself affect its validity, and that, if otherwise valid, it may properly be probated and enforced as the will of the one first dying or the separate will of each, or as the joint and mutual will of both according to the nature and terms of the provisions embodied therein. Of the cases denying the validity of such wills perhaps the most elaborately considered by

a court of our own country is *Walker v. Walker*, 14 Ohio St. 157 (82 Am. Dec. 474), where the authorities usually relied upon as supporting that view are very generally cited and approved, though by a divided court. The other, and at this time the most commonly accepted, view finds support in numerous cases, among which we may cite, *Ex parte Day*, 1 Bradf. Sur. (N. Y.) 476; *Will of Diez*, 50 N. Y. 88; *Betts v. Harper*, 39 Ohio St. 639 (48 Am. Rep. 477); *Will of Davis*, 120 N. C. 9 (26 S. E. 636, 38 L. R. A. 289, 58 Am. St. Rep. 771); *Dufour v. Periera*, 1 Dick. 421; *Schumaker v. Schmidt*, 44 Ala. 454 (4 Am. Rep. 135); *Breathitt v. Whittaker*, 8 B. Mon. (Ky.) 530; *Raine's Case*, 1 Swa. & T. (Eng.) 144; *Black v. Richard*, 95 Ind. 184. And see 1 Jarman on Wills, 27; Schouler on Wills (2d Ed.) section 457. When such wills are reciprocal merely—that is, where the provision is that the survivor shall succeed to the estate and interest of the first to die—there is ordinarily little or no room for doubt concerning the construction or effect of the instrument, and, generally speaking, its probate as the will of the first deceased is all that is necessary to accomplish the intended purpose.

When, however, such joint will undertakes to devise an estate to a third person, the solution of the question is not always quite so obvious. Where the makers of the will

own and hold property in severalty, and none
2. SAME: pro-
bate of joint
wills. jointly or in common, the devise, though joint in form, may well be treated as the separate and individual devise of each, and successively admitted to probate as such. But where the property devised is owned jointly or in common, it has been held that, while the will is admissible to probate as the separate will of each, it is proper to await the death of the survivor, and then admit it as the joint will of both. *Betts v. Harper*, 39 Ohio St. 639 (48 Am. Rep. 477).

The validity of the will now before us is not seriously

questioned but the claim is made by appellant that, conceding its validity in other respects, it did not affect the title or interest of John Baker in the land during his lifetime; that it was at all times revocable by him, and that, being seised of

^{3. SAME: agreement to make a will: joint ownership.} the title at and after the date of his marriage with plaintiff, her right of dower therein can not be affected by the devise made in the will. Upon the point thus made hinges the disposition of this case. While the legal title to the lands in controversy was held by John Baker and Harriet Baker in severalty, they declare in express terms that they were in fact owners of it all jointly, or in common and equal right. The record does not disclose, but we may, perhaps, assume, that the property represented the fruit of their joint labors and efforts, and that, recognizing their obligations to each other, they were willing each to concede to the other an equal right in their accumulations. They had the authority to thus deal with their own, and we think the court is bound to treat the property as being at the date of the will the common estate of husband and wife. Their statement is in substance an admission by each that the legal titles held by them in severalty were in truth so held for the use and benefit of both. It has often been held that an agreement upon sufficient consideration to make a will is valid, and that upon breach of such promise the beneficiary thereof has a right of action for damages, or, under some circumstances, may enforce specific performance. And the person coming into the possession of such property otherwise than as an innocent purchaser is held in equity to be trustee thereof for him to whom it ought of right to have been devised. *Brandes v. Brandes*, 129 Iowa, 351; *Mueller v. Batchler*, 131 Iowa, 650; *In re Strang's Estate*, 131 Iowa, 596; *Bird v. Jacobs*, 113 Iowa, 194. It appears therefore that, although a will is not a contract, yet the terms and benefits of a will may be the subject of contract, and the rights thus

lawfully accruing will be protected at law or in equity according to the circumstances of the particular case.

It is sometimes said that a will is essentially ambulatory, and subject to revocation at the desire of testator at all times until rights thereunder have become vested by death; and, while this is true as a general proposition, it is equally true that, where the will has been made pursuant to a valid contract, the testator can not by the act of revocation escape the obligations of his contract, nor will his heirs take any advantage by such revocation.

Now it is evident that where two persons unite in a joint will, whereby the survivor takes some benefit from the estate of the one first deceased, and such provision is coupled with another by which, subject to such right in the survivor, the estate of both is devised to a third person, there is an element of contract and mutual obligation between the makers, and when that devise becomes irrevocable, if it ever does, then there arises a vested right in the beneficiary of which he can not be arbitrarily deprived. It has been held by some authorities that such a will can not be revoked by either maker without notice to the other. *Robinson v. Mandell*, Fed. Cas. No. 11,959; *Dufour v. Periera*, 1 Dick. 419; *Breathitt v. Whittaker*, 47 Ky. 530. But however that may be, where one maker of such will dies before a revocation thereof by either, and the survivor accepts any benefit thereunder, we think it quite clear that he can no longer revoke, and that any attempt by him to divert the common estate in any other direction than is indicated by the common or joint devise is nugatory. The rule as deduced from the authorities by the author of the article on Wills in the American and English Encyclopedia of Law is stated as follows: "A mutual will is revocable by the testator at any time prior to his death, and this is so though he survives the other testator, provided

4. JOINT OR
MUTUAL
WILLS:
revocation.

he takes no advantage under the other's will." 30 Am. & Eng. Encyc. Law (2d Ed.) 621.

By most authorities the rule is stated in broader and stronger terms. In 1 Redfield on Wills, 183, it is said to be the settled doctrine that joint or mutual wills, duly executed, are irrevocable after the death of either maker. In a note to 1 Jarman on Wills, 18, Mr. Bigelow says:

A will is none the less a will because it may be based upon a binding contract, and yet the will in such case is irrevocable. . . . If this is true in the case of an ordinary will, the mere fact of irrevocability should not be fatal to a joint or mutual will. Indeed the doctrine of the revocability of a will amounts merely to this: That a will is ambulatory during the lifetime of a testator, provided he has not bound himself not to change it. Even the *Walker* case, above cited as the leading American case against the validity of a joint will, expressly leaves open the question whether the agreement or compact evidenced by such instrument may not be enforced in equity though invalid as a devise. The thought there suggested is approved and emphasized by the Missouri court in *Bower v. Daniel*, 198 Mo. 289 (95 S. W. 347). In that case, as in the one at bar, a husband and wife united in a joint will, giving to the survivor a life estate in the accumulations resulting from their common efforts, with remainder over. The wife died first, and the husband availed himself of the provision made by the will in his favor, but sought by making another will to divert the principal of the estate to beneficiaries not named in the joint devise. The court there held that equity would interfere to prevent such a breach of trust. In discussing the merits of the case the court says: 'It is evident from the provisions of the mutual or joint will that this aged or infirm couple, each owning property, made said will together for the purpose of disposing of and distributing their property equitably among their children after their death. After the death of the testatrix, her husband, William Daniel, accepted the provisions of the will in his favor, and under such circumstances equity will enforce the provisions of the

will against him, and all persons holding under him, who took with notice of its provisions or without value.'

The cases cited in support of this doctrine are as follows: *Carmichael v. Carmichael*, 72 Mich. 76 (40 N. W. 173, 1 L. R. A. 596, 16 Am. St. Rep. 528); *Bruce v. Moon*, 57 S. C. 60 (35 S. E. 415); *Van Dyne v. Vreeland*, 12 N. J. Eq. 142; *Robinson v. Mandell*, 3 Cliff. (U. S.) 169 (Fed. Cas. No. 11,959); *Edson v. Parsons*, 155 N. Y. 555 (50 N. E. 265).

In the *Edson* case, *supra*, there were separate wills made by sisters, each making a provision in favor of the other, with a remainder or residue to a brother. After the death of the one sister the other made a new will, limiting the estate given the brother. He brought an action to enforce the provisions of the earlier will, alleging that the original separate wills made by the sisters were made each in consideration of the other, and that after the death of one testatrix the other could not rightfully revoke her devise. While refusing the relief because of the failure of proof of the plaintiff's case, the court, speaking by Gray, J., says:

I fully concede that there is no reason in law nor any public policy which stands in the way of parties agreeing between themselves to execute mutual and reciprocal wills which, though remaining revocable upon notice being given by either of an intention to revoke, become upon the death of one fixed obligations of which equity will assume the enforcement if attempted to be impaired by subsequent testamentary provisions on the part of the survivor. The proposition is one which may be regarded as having been accepted generally. 1 Jarman on Wills, *27; 2 Story's Eq. Juris., section 785; Schouler's Wills, section 454; *Lord Walpole's Case*, 3 Ves. 402. A court of equity would in such event proceed upon the ground that the survivor was bound not merely in honor, but by his agreement and by the acceptance of the benefit which that agreement procured for him. In such a case obviously no remedy at

law would be adequate to the party in whose interest and for whose ultimate advantage the testamentary agreement had been entered into. Therefore equity would perform its high function of supplying the relief which the rules of law are not sufficiently elastic to comprehend, and, recognizing the obligation which in conscience and honor rested upon the surviving party, would decree a specific performance of the testamentary agreement by compelling those persons into whose possession the property affected may have come to account for and deliver it over to the complainant for being impressed with a trust in his favor.

That the owner of property may by contract, or by conduct which estops him from denying it, transmute his legal title into a trust for the benefit of another person is too well settled to require discussion. Unless, therefore, the right has been restricted by statute (a question which we shall later consider), it would seem to follow of necessity from the equitable principles approved in the cited authorities that, where two persons competent to make testamentary disposition of property enter into a compact or agreement by which they unite in devising their joint or several estates to a designated third person, subject to a life estate in the survivor, and upon the death of the one the survivor avails himself of the benefits of the devise in his favor, he must in equity be treated as holding the title in trust for the purpose indicated in the compact which became irrevocable upon the death of the other party thereto. Taking this as the general rule, we have next to inquire whether an exception is to be recognized where the makers of a joint will are husband and wife, and whether its operation is affected by the statute concerning contracts between husband and wife, or by the statute governing the rights of either in the estate of a deceased spouse.

In this state a married woman is, equally with her husband, competent to dispose of her estate by will. Code, section 3270. Under our statutes, and according to numerous

decisions of this court, they may buy from and sell to one another, and the conveyance of real estate from one to the other is effective without the interposition of a trustee. Code, section 3157. The only limitation imposed by statute upon their competency to contract with each other in relation to their separate estates is found in Code, section 3154, which provides that neither has any interest in the property of the other which can be made the subject of contract between them. This restriction invalidates agreements the subject of which is the right which, by reason of the marriage relation, one of the parties has in property owned by the other. It goes no farther. *Baxter v. Hecht*, 98 Iowa, 534. The inchoate rights which each has in the property of the other by virtue of their marriage are not property, and the statute wisely provides that they shall not be the subject of speculative transactions between them, but they may freely deal with each other concerning property owned by either, although the near or remote result of their dealings may be the loss or extinguishment of an inchoate right. For instance, husband and wife may make a contract of partnership into which their individual property shall be merged as capital, thereby putting to risk the inchoate rights of each in the other's estate, but no one will contend that such an agreement is within the prohibition of the statute. *Hoaglin v. Henderson*, 119 Iowa, 720. If husband and wife each own a quarter section of land, and they enter into an agreement by which they unite and convey both tracts to a third person in exchange for a half section conveyed to the wife alone, it can not be doubted that this also is a perfectly valid transaction, although the result of it is a radical change in their inchoate rights. Each has relinquished such right in a quarter section, and the husband has acquired such right in a three hundred and twenty acre tract—all of which was necessarily involved in the original agreement between them. This

5. SAME: relinquishment of dower.

is not in violation of the statute, because the subject of the contract is tangible substantive property owned by the parties, while the effect upon their inchoate rights follows only as incident to changes in ownership of the fee, and is effected by operation of law.

Coming a step nearer to the case in hand we see no good reason why husband and wife may not agree to unite their separate estates in the creation of a trust for the benefit of a third person, who shall come into the legal title and right of possession upon the death of the survivor. If to that end they execute a joint instrument, clearly expressing their purpose, then, whether it be called a contract, compact, will, or conveyance, we think it should be treated as a relinquishment of dower right, or, at worst, when one maker has died without attempting to revoke it, the other should be held estopped to set up any right which tends in whole or in part to the defeat of the common purpose. A contract is none the less a contract because it contains provisions which are testamentary in character, nor is a will any less a will, if properly executed, because it embodies contractual features. *Carmichael v. Carmichael*, 72 Mich. 76 (40 N. W. 173, 1 L. R. A. 596, 16 Am. St. Rep. 528); *Schneringer v. Schneringer*, 81 Neb. 661 (116 N. W. 491). In *College v. Ritch*, 151 N. Y. 282 (45 N. E. 876, 37 L. R. A. 305), it is said: "If the testator either is induced to make a will, or not to change one after it is made, by the promise, express or implied on the part of a legatee, that he will devote his legacy to a certain lawful purpose, a secret trust is created on the part of the legatee, and equity will compel him to apply property thus obtained in accordance with his promise." To the same effect, see *Ahrens v. Jones*, 169 N. Y. 555 (62 N. E. 666, 88 Am. St. Rep. 620); *O'Hara's Will*, 95 N. Y. 403 (47 Am. Rep. 53). If, as in the cited cases, the rule is thus applied to promises, agreements, and inducements shown by evidence,

aliunde, there should be no hesitation over its recognition in a case where, as here, the compact and consideration appear upon the face of the instrument itself.

From whatever angle we approach the instrument in controversy we are led to the same conclusion that from the death of Harriet Baker and the probate of her will at the instance of John Baker, and his acceptance of its benefits, if at no earlier date, he held the title in trust for the beneficiary named in the writing. Indeed there is no evidence whatever that John Baker did not so understand his relation to the property, or that he intended in any manner to divert any part of the property from the course designated for it in the joint devise. If, therefore, the appellant is entitled to any part or share in said property, it is because she has acquired it by operation of law through her marriage with John Baker some months after the probate of the will of his first wife. And this her counsel say she did acquire under the statute. By Code, section 3366, widow is entitled to dower in all lands owned by her husband at any time during their marriage, and to which she has made no relinquishment. By Code, section 3376, it is provided that the right to a widow's share shall not be affected by any will of the husband. But it must be remembered that unless the husband has at some time during the marriage relation held a heritable estate of some kind—legal or equitable—in the property in question no right of dower could attach thereto in the wife's favor. The stream can not rise higher than its source. *Dunham v. Osborn*, 1 Paige (N. Y.) 634; *Pritts v. Ritchey*, 29 Pa. 71; *Apple v. Apple*, 38 Tenn. 348; *Edwards v. Bibb*, 54 Ala. 475; *Sullivan v. Sullivan*, 139 Iowa, 679.

If, therefore, we are correct in the conclusions already announced, and John Baker at the time of his marriage to the appellant herein held the legal title of the land in trust for the uses mentioned in the joint will made by himself and his former wife, then no right or dower ever arose

in appellant's favor. Under such circumstances the statutes above cited, and on which counsel for appellant rely, can have no application. In other words, neither a second marriage nor, as counsel suggests, the birth of a child of such union, could operate to reinvest the husband with a heritable estate with which he had already irrevocably parted.

This conclusion renders unnecessary any consideration of other questions argued by counsel. The decree of the district court appears to have been right, and it is *affirmed*.

CATHERINE SCHROPPFER, Appellant, v. HAMILTON COUNTY,
IOWA, DRAINAGE DISTRICT No. 37 and B. J. STARK,
Appellee.

Drainage: ASSESSMENTS FOR BENEFITS. The fact that it may be necessary to lay more drains to render lands tillable will not release the land owner from an assessment for the benefits arising from the drains as laid; it not appearing that his assessments are proportionately higher than those of other land owners. In this proceeding to confirm an assessment for drainage purposes the evidence is held to sustain an assessment of plaintiff's lands for substantial benefits already received.

Appeal from Hamilton District Court.—Hon. C. G. LEE,
Judge.

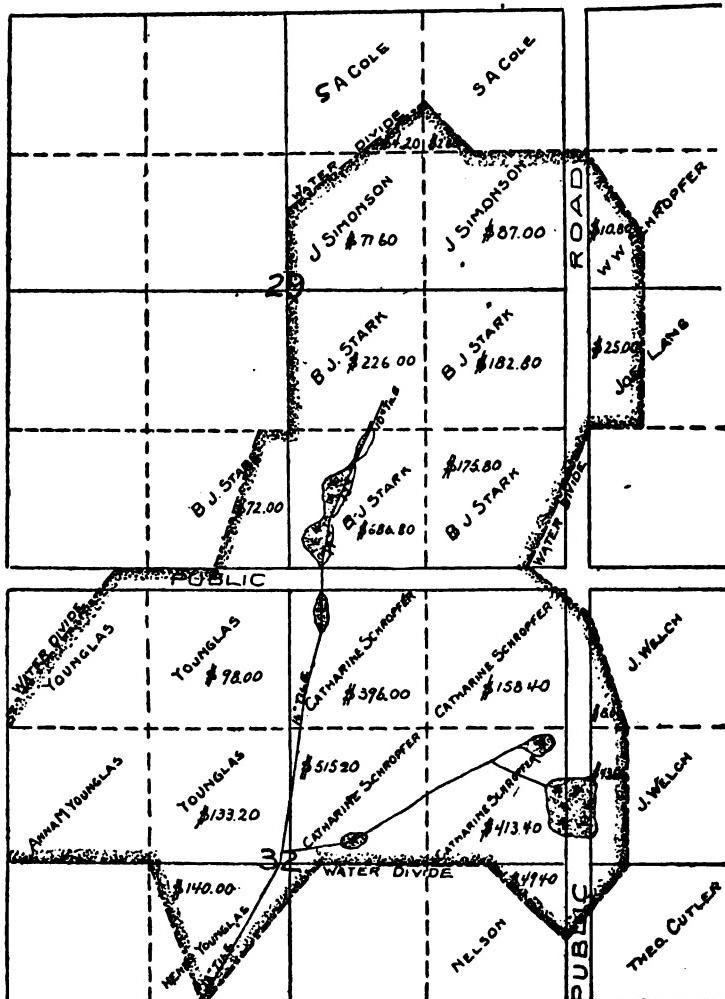
SATURDAY, APRIL 9, 1910.

THIS is an appeal from an order of the district court confirming an assessment made against plaintiff's lands by the Board of Supervisors in certain drainage proceedings.—*Affirmed.*

D. C. Chase and Wesley Martin, for appellant.

J. M. Blake and A. N. Boeye, for appellees.

PER CURIAM.—The following map shows the various forty acre tracts included in the drainage district under consideration, together with the names of the respective owners and the amount of assessment against each tract:



The plaintiff is the owner of the N. E. $\frac{1}{4}$ of section 32, and her assessment on each forty acre tract thereof was as follows: On N. W., \$396; S. W., \$515.20; S. E., \$413.40; N. E., \$158.40.

It will be noted that a sixteen inch tile extends northward through the two west forties of the plaintiff's land, and an eight inch tile extends eastward through her two south forties. The course of the water is southward from the sixteen inch tile. The same empties into an eighteen inch tile, which latter empties into an open ditch. Witnesses on behalf of plaintiff testified to their opinion that the drain was of no benefit to plaintiff's land. The defendant introduced no testimony. It is contended, therefore, that we are bound to accept the opinions of the plaintiff's witnesses. The detailed facts, however, testified to by these witnesses, satisfy us that there was no warrant whatever for the opinions so expressed. On the contrary, the facts so testified to show very substantial benefit. The most that can be said for plaintiff is that the tile in question is not sufficient to completely drain her land so as to render it safely tillable. If such facts could properly furnish the basis for an opinion that no benefit was received, then few drainage propositions could be deemed to be beneficial to landowners who are assessed therefor, for few of them result in the complete drainage of the land so assessed without additional drainage by the landowner at his own expense. Witness Schropfer, a brother of the plaintiff, testified in her behalf that the outlet of the eighteen inch tile into the open ditch was insufficient because the water stood above the tile, and that this had the effect of keeping the tile full of dead water. He also testified that the eight inch tile was not large enough to carry off the water, but that "a fourteen inch tile would do it." This witness testified on cross-examination as follows:

Cross-examination of W. W. Schropfer: The whole quarter section is quite level. The northeast forty is the driest. There was thirty to thirty-five acres of crop on it in 1908. The balance of the quarter was in meadow and pasture. Part of it had been seeded down, but, on account of being wet, had went back into slough grass. None of this land except this thirty or thirty-five acres has been broken up since the tile line was put in. I don't think it would have raised a good crop last year. It was so very wet in June and July and the tile did not get the water off for some time. There is a sixteen inch tile running north and south across the west part of my sister's quarter section and across the road onto the Stark land, then it is a fourteen inch. This line drains my sister's land about the same as it does the Stark land. The grade is very flat on this line, but it emptied the ponds on the Stark land. This would indicate that the sixteen inch tile was working. Just at the south line of my sister's land on the sixteen inch tile line there is a man-hole or take-in. I looked in there, and the water is running in it. I represented my sister. She was unmarried. I knew they were going to put in an eight inch tile from the road southwest across the quarter section. I told Mr. Iliff that I did not think it was large enough. He said that depended on the fall. I was not at the hearing on the question of establishment. I did not make any objection at that time. I knew it was going to be constructed out to the road.

Witness Frayne, a drainage engineer, testified as follows:

Direct examination: I would not consider such an outlet sufficient or proper. The grade is not sufficient to clean the tile and keep it from filling up with silt in this particular instance. The tile are not self cleaning. Silt is the particles of soil taken by the water into the tile and lodged. The result of the mouth of the tile being under water, is to fill up the tile as far as the water backs up, because there is no current. I would say, from my experience as a drainage engineer, that tile lines emptying into an open ditch should be above the bottom of

the ditch; they should be, anyway, one-half the size of the tile above the bottom of the ditch. When I made this examination, I could see that silt had accumulated at the mouth of this eighteen inch tile. The water did not flow strong. I went up to the point of the junction with the eight inch tile. I judge this is eighty rods above. I examined this tile at the junction. I found the tile full of mud and water, practically standing. I made an examination of the grade on the eight inch tile. I would say it would fill up, and that there would be no result gained from the drainage. I make the statement that it will fill and become useless as far as drainage is concerned, because the tile has no outlet. I examined the grades of the tile lines. The sixteen inch line was three and one-half of an inch to the one hundred feet. I would not want to use less than one and one-fifth to the one hundred feet for sixteen inch tile. If you had an outlet this would be sufficient. The tile should be laid above the bottom of the open ditch at least a foot. Where the mouth is down in the open ditch, it impedes the flow of water in the tile. The eight inch line of tile on Schropfer's is not large enough to drain the area of land included in the water shed which this eight inch tile is supposed to drain. To give perfect drainage of this area it should be at least twelve inches.

The same witness testified on cross-examination as follows:

Cross-examination of Mr. Frayne: I have not had much preliminary preparation as an engineer. I have done some reading. I took a special course at Ames for three weeks. I don't make engineering a business now; I used to. I have done the preliminary surveying on some of the county drains. I don't know what the grade was on these drains. I aim to get all the fall I can. That depends on the lay of the land. I looked over the Schropfer quarter section in controversy. It is a very flat piece of land. There is no slope to it that is noticeable to the naked eye. I took the grade across one forty of the Schropfer land. The grade was a trifle over two percent, about two and one-half inches to the one hundred feet. It is a reason-

able good grade. I never ascertained whether this was a sufficient grade to drain one hundred and twenty-five acres with an eight-inch tile or not. On the main line where the eighteen-inch enters the open ditch there is a concrete bulkhead and the tile goes through this bulkhead. At the time I was there, the upper end of this open ditch was filled up so as to hold the water in the tile. This was probably caused by the silt in the water running in the tile. If the open ditch was cleaned out it would give a fair outlet for the large tile.

He also testified that upon examination he found about three inches of mud in the large tile and from one to three inches of silt in the sixteen-inch tile.

These are plaintiff's principal witnesses on the question of the efficiency of the tile. From this it is manifest that a cleaning of the open ditch at the mouth of the outlet of the eighteen-inch tile will give normal efficiency to both the eight-inch and the sixteen-inch tile. As respects the failure of the tile to carry off all the water, the testimony of the witnesses is confined to a very wet period in the summer of 1908, and to two dates in December and February when the ground was covered with slush and ice. If it be true it will require more drains to be laid in order to render plaintiff's lands tillable, this furnishes no reason why she should not be charged with the benefit of the present tile drains as far as it goes. So far as comparative benefits are concerned, no claim is made by the witnesses that plaintiff's assessments are proportionately higher than those of any other landowner except Welch. The testimony does tend to show that Welch's assessment is too low. Taking the testimony as a whole, it is manifest to us that plaintiff ought to be assessed as for substantial benefits received. If she is assessed too high, we have no data before us from which we could determine what lower assessment she should bear, except testimony to the effect that she should bear no assessment whatever. We feel compelled to disregard these opinions

on this record. Approximation is the best that can be attained in assessments of this character.

We think the district court properly confirmed the assessment as made, and its order is now *affirmed*.

**STATE OF IOWA, EX REL. J. D. ROBBINS, Appellant, v.
GEORGE H. PARKER, Defendant, and W. R. WHIT-
NALL, Intervener, Appellees.**

Counties: DIVISION INTO SUPERVISOR DISTRICTS: WHEN ORDER BECOMES EFFECTIVE. The order of a board of supervisors dividing a county into supervisor districts takes effect immediately upon the making of the order.

Same: NOMINATION OF SUPERVISORS: VACANCIES: HOW FILLED. A board of supervisors has power to divide the county into supervisor districts after the holding of a primary election and the nomination of supervisors; and where this has been done and prior thereto the nomination of a member of the board from the county at large was made, rather than for the district thereafter created, such nomination will not be treated as one for the district but a vacancy occurs to be filled by the proper authorities by a nomination for such district.

Elections: Mandamus: PLACING OF NAME OF CANDIDATE ON BALLOT. A proceeding by *mandamus* is the proper remedy to compel a county auditor to place the name of a candidate for office upon the official ballot.

Same: CERTIFICATE OF NOMINATION: FINALITY: JUDICIAL REVIEW. Ordinarily a certificate of nomination issued by a board of supervisors must be regarded as final unless objections are thereafter filed; but where the board issued a certificate of nomination for the office of a member of the board of supervisors from the county at large, when as a matter of fact there was no such office to be filled, the board having divided the county into districts subsequent to the nomination and certification thereof, the certificate was not final so as to preclude the court from determining the rights of the parties to have their names placed upon the official ballot, although no objections thereto were filed.

Same: JUDGMENT: CONCLUSIVENESS. A court has no power to create an office by ordering that a name should go on the official ballot

for that office; so that where one had been nominated for a member of the board of supervisors from the county at large and received a certificate of nomination, and the board subsequently and prior to the election divided the county into districts, thus abolishing the office of supervisor at large, a decree directing that the name of such person be placed on the official ballot for a supervisor at large was not conclusive of his right to hold the office of supervisor in his district, to which he had not been elected and for which he was not a candidate, although he received at the primary election a majority of the votes cast, both in the county at large and in such district.

Appeal from Mills District Court.—HON. A. B. THORNELL,
Judge.

SATURDAY, APRIL 9, 1910.

THIS is a *quo warranto* proceeding to test the right of the defendant Parker to hold the office of member of the board of supervisors of Mills County, Iowa. The trial court dismissed the petition, and plaintiff appeals.—*Affirmed.*

A. E. Cook and Harl & Tinley, for appellant.

W. S. Lewis, for appellee Parker.

John Y. Stone and Genung & Genung, for Whitnall, intervener.

DEEMER, C. J.—Plaintiff claims that he was elected a member of the board of supervisors of Mills County at the November, 1908, election for the term beginning January 1, 1909. He alleges that he duly qualified for the office, but that the other members of the board refused to admit or accept him as a member under the claim that his election was invalid; that one James Greig was the incumbent of the office by reason of there being no election; that thereafter Greig resigned and defendant Parker was named as his successor; that defendant immediately quali-

fied and is now exercising the functions of the office. Defendant filed answer tendering some issues to be herein-after noted. Whitnall, a citizen and resident of the county, filed a petition of intervention, in which he alleged that "the board of supervisors of Mills County, Iowa, on June 29, 1908, and after the nomination of candidates under the primary election of 1908, had divided Mills County into three supervisor districts, and that there were no nominations for member of the board of supervisors made from either of said districts, and that the nomination and election of appellant was illegal and void, and that by reason of there being no election the incumbent James Greig held over and duly qualified as such and thereafter resigned, and defendant was properly and duly elected as his successor and had qualified as such and was rightfully entitled to the office." Appellant in reply admitted "that the board of supervisors of Mills County had attempted to divide the county into supervisor districts on June 29, 1908; but denied that the same was valid or effective as to the general election of 1908, and did not deprive the nominees of the various political parties of Mills County, who had theretofore been nominated, of their rights to have their names placed upon the official ballot or to prevent the successful candidate at such election from becoming entitled to the office; admitted that Greig was the incumbent and attempted to qualify under claim that he held over as member of the board and thereafter resigned, and that defendant was elected and attempted to qualify as his successor; alleged that the election of the plaintiff was valid, and that after his election and qualification there was no vacancy in said office, and that the attempted qualification of Greig was invalid, and his attempted resignation and the appointment of the defendant Parker as his successor and his attempt to qualify were void and of no force and effect." He also pleaded an adjudication of the matters in controversy in a prior action of *mandamus*,

wherein the court ordered that plaintiff's name be placed upon the official ballot for the November, 1908, election as a candidate for member of the board of supervisors.

The facts are that prior to June, 1908, the county of Mills was entitled to three supervisors elected from the county at large, and at the regular primary election held in June of the year 1908 plaintiff became a candidate for member of the board for the term commencing January 1, 1909, and one Nipp became a candidate for the same office for the term beginning January 1, 1910, and each received the nomination of his party for these positions at the said primary election. Each received his certificate of nomination as provided by the primary law. After the primary was held and the certificates of nominations were issued, the board of supervisors, at a meeting held June 29, 1908, passed a resolution dividing the county into three supervisor districts. Two of these districts were of practically contiguous territory; but the third consisted of a tier of townships extending across the west and halfway across the north and south sides of said county. Plaintiff was a citizen and resident of one of these districts and of the one which, if the subdivision of the county into districts should be held effective for the fall election, would have been entitled to be a member of the board whose term commenced January 1, 1909. As the time for the election approached, it became apparent that the county auditor did not intend to place the names of the nominees at the primary, Robbins and Nipp, upon the official ballot, for the reason that, because of the subdivision of the county by the board, they were not entitled to have their names placed upon the ballot. Plaintiff then brought an action of *mandamus* in the district court of Mills County against the county auditor to compel him (the auditor) to place re-lator's name upon the official ballot. The auditor pleaded the subdivision of the county and other matters as a defense; but upon trial the action was sustained, and the

auditor was ordered and directed to place relator's name upon the ticket. Nipp's name was also placed upon the ticket, and he and relator were the Republican candidates at large for members of the board of supervisors as before stated. When the votes were canvassed, it was found that relator had a majority of all the votes cast for member of the board and also a majority of the votes cast in the district where he resided, as such district was created by the board after the primary election. Relator qualified as such member and presented himself before the board demanding that he be recognized as a member thereof. His demand was refused, and the board, claiming that there had been no valid election, permitted one Greig, a member whose term would otherwise have expired, to qualify and assume the duties of the office as a holdover member. Thereafter Greig resigned, and the clerk, auditor, and recorder of the county filled the vacancy by appointing defendant Parker, who qualified and assumed the duties of the office and was so acting when this action was commenced.

After a hearing upon testimony and issues joined, the trial court found that "the judgment and adjudication in the *mandamus* suit was a complete and final adjudication of the right of the relator to the office, binding upon the defendant intervenor and all citizens, if the court had jurisdiction, but held that the court did not have jurisdiction of the action, because *certiorari* was the proper remedy to overturn the action of the board of supervisors in dividing Mills County into supervisor districts, and also held that the special tribunal referred to in the election law was the sole and exclusive tribunal for determining as to whose name should go upon the official ballot as candidates nominated at the primary election." The appeal challenges these findings, and also the final order dismissing relator's petition. The main propositions relied upon by appellant are: (1) That the judgment in the *mandamus* proceed-

ing, not having been appealed from, is final and conclusive, and constitutes a complete and final adjudication of all the matters at issue in this case. (2) That the provision of the Code Supplement creating a tribunal to settle contests for party nominations has no application to the facts disclosed by this record, and that *mandamus* is the proper remedy. (3) That the action of the board of supervisors in districting or subdividing the county did not affect the right of the relator to have his name go on the official ballot or prevent his election to the office for which he had been nominated. And (4) that the action of the board in districting or redistricting the county was legislative in character and could not be reviewed by *certiorari*, that *mandamus* was the proper remedy, and that the judgment in the *mandamus* proceeding was final and conclusive.

The statute under which the board of supervisors acted in redistricting or subdividing the county for supervisor purposes reads as follows:

The board of supervisors may, at its regular meeting in June in any even-numbered year, divide its county by townships into a number of supervisor districts corresponding to the number of supervisors in such county; or, at such regular meeting, it may abolish such supervisor district, and provide for electing supervisors for the county at large. Code, section 416.

Such district shall be as nearly equal in population as possible, and shall each embrace townships as nearly contiguous as practicable, each of which said districts shall be entitled to one member of such board, to be elected by the electors of said district. Code, section 417.

In case such division or any subsequent division shall be found to leave any district or districts without a member of such board of supervisors, then, at the next ensuing general election, a supervisor shall be elected by and from such district having no member of such board; and if there be two such districts or more, then the new member or members of said board shall be elected by and from the district or districts having the greater population according

to the last state census, and so on, until each of said districts shall have one member of such board. Code, section 418.

Any county may be redistricted, as provided by the three preceding sections, once in every two years, and not oftener, and nothing herein contained shall be so construed as to have the effect of lengthening or diminishing the term of office of any member of such board. Code, section 419.

Passing, for the present, the point as to whether or not the board acts judicially in districting or redistricting under these sections, we here quote other sections of the statutes which are regarded as material to our inquiry. These are:

Section 1087a1 of the Code Supplement, reading this wise:

That from and after the passage of this act the candidates of political parties for all offices which under the law are filled by the direct vote of the voters of this state at the general election in November (except candidates for the office of judge of the supreme, district and superior courts), for the office of Senator in the Congress of the United States, and for the office of elector of the President and Vice President of the United States, shall be nominated by a primary election, and delegates to the county conventions of said political parties or organizations and party county committeemen shall be elected at said primary election, at the times and in the manner hereinafter provided. The provisions of chapters three (3) and four (4), title six (6), and chapter eight (8), title twenty-four (24), of the Code, shall apply so far as applicable to all such primary elections, the same as general elections, except as hereinafter provided.

Section 411 of the Code Supplement reads as follows:

At the general election in the year 1906 there shall be elected for a term of two years, members of the county board of supervisors to succeed those whose terms were extended one year by the biennial election amendment. At the general election in the year 1906, and biennially there-

after, there shall be elected members of the board of supervisors for a term of three years to succeed those whose terms of office will expire on the first Monday in January following said election; there shall also be elected members for a term of three years to succeed those whose terms will expire on the first Monday in January one year later than the aforesaid date. It shall be specified on the ballot when each shall begin his term of office. No member shall be elected who is a resident of the same township with either of the members holding over (but a member-elect may be a resident of the same township as the member he is elected to succeed), except that, in counties having five or seven supervisors, and having therein a township embracing an entire city of thirty-five thousand inhabitants or over, he may be a resident of the same township; and in no case shall there be more than two supervisors from such township.

Section 1087a24, Code Supp., reads:

In case of a tie vote resulting in no nomination for any office, or election of delegates or party committeeman, the tie shall forthwith be determined by lot by the board of canvassers, or judges of election, as the case may be. Vacancies occurring after the holding of any primary election occasioned by death, withdrawal or change of residence of any candidate, or from any other cause, shall be filled by the party committee for the county, or state, as the case may be, representing the party in which the vacancy nomination occurs.

Section 1100, Code 1897, reads:

Nominations for candidates for state offices may also be made by nomination paper or papers signed by not less than five hundred qualified voters of the state, for county, district or other division not less than a county, but such paper or papers signed by not less than twenty-five qualified voters, residents of such county, district or division; and for township, city, town or ward, by such paper or papers signed by not less than ten qualified voters, resident of such township, city, town or ward; but the name of a candidate placed upon the ballot by any other method shall not be

added by petition for the same office. Each elector so petitioning shall add to his signature his place of business and post office address.

Section 1102 of the Code reads as follows:

If a candidate declines a nomination, or dies before election day, or should any certificate of nomination or nomination paper be held insufficient or inoperative by the officer with whom it may be filed, or in case any objection made to any certificate of nomination, nomination paper, or to the eligibility of any candidate therein named, is sustained by the board appointed to determine such questions as hereinafter provided, the vacancy or vacancies thus occasioned may be filled by the convention, caucus, meeting, or primary, or other persons making the original nominations, or in such a manner as such convention, caucus, meeting or primary has previously provided, if the time is insufficient for again holding such convention, caucus, meeting or primary, or in case no such previous provisions being made, such vacancy shall be filled by the regularly elected or appointed executive or central committee of the particular division or district representing the political party or persons holding such convention, primary, meeting or caucus, and certified as hereinbefore provided. The certificates of nominations made to supply such vacancies shall state, in addition to the facts hereinbefore required, the name of the original nominee, the date of his death or declination of nomination, or the fact that the former nomination has been held insufficient or inoperative, and the measures taken in accordance with the above requirements for filling a vacancy, and shall be signed and sworn to by the presiding officer and secretary of the convention, caucus, meeting or primary, or by the chairman and secretary of the committee, as the case may be.

And section 1087a29, Code Supp., is as follows:

Nothing contained in this act shall be construed so as to prohibit nomination of candidates for office by petition as now authorized by law; but no person so nominated shall be permitted to use the name of any political party au-

thorized or entitled under this act to nominate a ticket by primary vote or that has nominated a ticket by primary vote under the provisions of this act.

Sections 1103 and 1104 of the Code of 1897 read:

All objections or other questions arising in relation to certificates of nomination or nomination papers shall be filed with the officer with whom the certificate of nomination or nomination papers to which objection is made are filed. Those with the Secretary of State shall be filed not less than twenty days, and those with other officers not less than eight days, before the day of election, except that nominations to fill vacancies occurring after said time, or in case of nomination made to be voted on at a special election, objection shall be filed within three days after the filing of the certificate of nomination papers. Objections filed with the Secretary of State shall be considered by the Secretary and Auditor of State and Attorney General, and a majority decision shall be final; but if the objection is to the certificate or nomination papers of one or more of the above named officers, said officer or officers so objected to shall not pass upon the same, but their places shall be filled respectively, by the Treasurer of State, the Governor, and the Superintendent of Public Instruction. Objections filed with the county auditor shall be final; but if the objection is to the certificate or nomination papers of one or more of the above named county officers, said officer or officers so objected to shall not pass upon such objection, but their places shall be filled, respectively, by the county treasurer, the sheriff and county superintendent. . . . When any of the above objections are made, notice shall forthwith be given to the candidate affected thereby, addressed to his place of residence as given in the certificate or nomination papers, stating that objections have been made to his certificate or nomination papers, also stating the time and place such objections will be considered.

Certificates of nomination and nomination papers of candidates for state, congressional, judicial and legislative offices shall be filed with the Secretary of State, not more than sixty nor less than thirty days; those for all other officers, except for cities and towns, with the county audit-

ors of the respective counties, not more than sixty nor less than twenty days; and for the offices in the cities and towns, with the clerks thereof, not more than forty nor less than ten days, before the day fixed by law for the holding of the election. Such certificates and nomination papers thus filed, and being apparently in conformity with law, shall be regarded as valid, unless objection in writing thereto shall be made, and, under proper regulations, shall be open to public inspection, and preserved by the receiving officer for not less than six months after the election is had. Any error found in such papers may be corrected by the substitution of another, executed as is required for an original nomination certificate or paper. . . . Certificates of nomination or nomination papers, nominating candidates for office to be filled by the electors of a county, may be filed with the county auditor at any time not less than five days before the election.

Section 1087a19 of the Code Supplement provides:

On Tuesday next following the primary election in June, the board of supervisors shall meet, open, and canvass the returns from each voting precinct in the county, and make abstracts, thereof, stating in words written at length the number of ballots cast in the county by each political party, separately, for each office, the name of each person voted for and the number of votes given to each person for each different office and shall sign and certify thereto and file the same with the county auditor. Such canvass and certificate shall be final as to all candidates for nomination to any elective county office or office of a subdivision of a county; and the candidate or candidates of each political party for each office to be filled by the voters of any subdivision of a county having received the highest number of votes shall be duly and legally nominated as the candidate of his party for such office; and the candidate or candidates of each political party for each office to be filled by the voters of a county having received the highest number of votes, and not less than thirty-five percentum of all the votes cast by the party for such office, shall be duly and legally nominated as the candidate of his party for such office; and each candidate so nominated shall be entitled to have his name printed on the official ballot to be voted

for at the general election without other certificate, and the board shall prepare and certify a list of the candidates of each party so nominated, separately, and deliver to the chairman of each party central committee for the county a copy of the list of candidates nominated by the party he represents; and shall also prepare, certify and deliver to such chairman a list of the offices to be filled by the voters of a county for which no candidate of his party was nominated, together with the names of the candidates for each of such offices voted for at the primary election and the number of votes received by each of such candidates.

Section 1087a10, Code Supp., reads:

No candidate for an elective county office shall have his name printed upon the official primary ballot of his party unless at least thirty days prior to the day fixed for holding the primary election a nomination paper shall have been filed in his behalf in the office of the county auditor.

. . . A candidate for an office to be filled by the voters of any subdivision of a county shall not be required to file any nomination paper or papers. . . . Each and every candidate shall make and file his affidavit stating that he is eligible to the office for the township, county, district or state in which he is and will be a *bona fide* candidate for nomination for said office, and shall file such affidavit with the said nomination paper or papers, when such paper or papers are required. If no such paper or papers are required, then he shall file such affidavit alone, with the county auditor, at least thirty days prior to such primary election, and the filing of such affidavit shall entitle such candidate to have his name printed on the official primary ballot of his party.

These are all of the provisions of the written law which either side claim to be applicable to the case. As much dependence is placed upon the order made in the *mandamus* case, we here quote from the record showing the finding and order of the trial in that case:

The plaintiff also offered in evidence the decree in the action of *Robbins v. Agan*, rendered October 12, 1908,

showing the appearance of the defendants by counsel and the full submission of the case, finding that prior to June 1, 1908, the members of the board of supervisors were elected from the body of the county, and that at the regular primary election of June 2, 1908, the plaintiff was nominated as the Republican candidate for member of the board of supervisors, and so declared and a regular canvass of said primary election returns by the board of supervisors; finding that on June 29, 1908, at an adjourned meeting of the regular session of the board, the resolution set out in defendant's answer was passed, and that, acting under the terms of said resolution, the county auditor refused to place the name of the plaintiff upon the official ballot. The court also found as a conclusion of law that the office for which the plaintiff was nominated was one of the offices to be filled by direct vote of the electors at the general election of 1908, as provided in section 1087-a19, Supplement of the Code; that at the canvass of the primary election returns the plaintiff was duly declared to have received the nomination of the Republican party for such office; and that section 1087a19 provided that such canvass shall be final and conclusive. Further finding that the board of supervisors can not by this resolution annul the effect of the primary election because it would be subversive of the will of the electors as expressed at the primary election, and because it would be contrary to public policy and contrary to the election and spirit of the primary election law. Upon the contention that *certiorari* should have been adopted, the court in its decree said: 'It is not sought to set aside the action of the board in this case. This action is brought to require the auditor to perform a duty which ought to be performed by him if the facts, as also are shown, a duty imposed upon him by law.' Also holding that the plaintiff had such interest as to entitle him to bring the action, and the court held that the action of the board did not excuse the auditor in refusing to perform his duty, and the court in its decree awarded a writ of *mandamus* directing the defendant to place the name of the plaintiff upon the official ballot for the general election of November, 1908, as the Republican candidate for the office of member of the board of super-

visors for the term for which he was nominated at the primary election in June, 1908.

The effect of this decree presents the principal matter of controversy. Some of the propositions involved have already been decided in previous opinions filed. In *Lahart v. Thompson*, 140 Iowa, 298, we said:

The fundamental inquiry in the case thus presented is whether the board of supervisors had the power to discontinue the division of the county into districts, and, if so, whether said order could affect the status of the candidates theretofore nominated and deprive them of their standing as district candidates. As to the authority or jurisdiction of the board to make such order there can be no reasonable doubt. The statute above cited (Code, section 416) expressly provides that the board of supervisors may, at its regular June meeting in any even numbered year, divide its county into as many districts as there are members of the board, or at such regular meeting it may abolish supervisor districts and provide for electing supervisors for the county at large. This statute has never been expressly repealed, nor do we find any other statute since enacted which is so inconsistent therewith as to effect a repeal by implication. The recent enactment authorizing party nominations to office at a primary election, on which statute appellant relies, makes neither direct nor indirect reference to the provision here in question. Its clear purpose is not to change or in any way affect tenure of office or eligibility to office, or to regulate or limit the legislative or *quasi* legislative powers already conferred upon boards of supervisors or other inferior bodies, but simply to provide an appropriate and orderly method for naming candidates for the offices to be voted for at an approaching election. The nomination at a primary election gives the person receiving it no vested interest in the office for which he is named or to any place upon the official ballot which may not be taken away by the state acting through its Legislature or some inferior body to whom the power has been delegated. The office of supervisor is a creature of the statute, as is the delimitation of the territory from which such officer shall be elected. If the

Legislature had been in session on June 6, 1908, and had then enacted in due form a statute abolishing the supervisor district and providing that supervisors should thereafter be elected from the county at large, no lawyer would contend that it thereby exceeded its constitutional powers, or that the operation of such statute could be in any wise controlled or affected by the fact that plaintiffs had already been nominated to such office by their respective districts. If this might have been done by the state Legislature, it could be done with equal effectiveness by the board of supervisors to which that power had been expressly delegated. The effect of the order was to abolish the districts. They no longer existed, and the county auditor was bound to regard that fact in making up the official ballot. From the date of said order the choice of supervisors rested with the electors of the county at large, and not with the electors of separate districts. It follows that, if plaintiffs were entitled to have their names placed upon the ballot at all as candidates for the office of supervisors, it was on the ballot made up for the use of the electorate of the entire county. We do not decide whether the result which counsel deprecates necessarily follows this holding, or whether, the office of supervisor being a county office even where the election is by districts, the nomination of appellants by their districts was not sufficient to entitle them (the districts being subsequently abolished) to a place upon the ballot for the entire county. That which appellants demand to have recognized is the right to have their names placed upon the ballot to be used within the territory constituting their respective districts as said districts existed at the date of the primary, and that they be not placed upon the ballot proper for the county at large. That claim, we are very clear, can not be sustained. They are not here claiming any right or relief as candidates for election by the county at large, and anything we might say upon that subject would be mere *dictum*.

This case settles the contention that the so-called "primary law" repealed section 416 *et seq.* of the Code, and also in effect declares that a redistricting order goes into

effect at once and is not to be postponed until candidates may be chosen at a primary election. It does not decide, however, that nominees selected at a previous primary may not have their names placed upon the official ballot as candidates for members of the board.

1. COUNTIES: division into supervisor districts: when order becomes effective.

In *State v. Hayward*, 141 Iowa, 196, we said:

The first requirement of the primary law is that the candidates of political parties for all offices which under the law are filled by the direct vote of the voters of this state at the general election in November shall be nominated by a primary election. This requirement is mandatory, and the method of nomination provided for in the primary statute is exclusive. It follows that the provision of chapters 3 and 4, title 6, of the Code, so far as they provide methods of nomination inconsistent with the provisions of the primary enactment, were by that enactment repealed by implication. If this be true, the district central committee had no authority under section 1102 of the Code to nominate the relator for the office of Senator for the reason that section 1087a24, in so far as it relates to the matter under consideration, is a substantial re-enactment of the provisions of section 1102 of the Code, and furnishes the only authority in the matter. Section 1087-a24 provides that 'vacancies occurring after the holding of any primary election occasioned by death, withdrawal or change of residence of any candidate or from any other cause, shall be filled by the party committee for the county, district or state, as the case may be, representing the party in which the vacancy nomination occurs.' In our judgment the authority of any party committee is therein limited to cases where nominations have been previously made at the primary, and vacancies have thereafter occurred. This section does not authorize a party committee to make a nomination in the first instance. It is only given power to nominate when the nominee of the primary election is no longer a candidate, and because of such fact a vacancy occurs. *Healy v. Wipf*, *Secretary (S. D.)* 117 N. W. 521. And no other or greater power was conferred by section 1102 of the Code, and, were we to

be governed by that section in this case, we should be compelled to hold the central committee without the power assumed by it. Section 1087a26 provides for nominations by convention when there has been a failure for any reason to nominate a Senator at a primary election. This course was open to the interested parties herein, and they had no right or authority to proceed as they did.

In the same case, in stating the effect to be given section 1087a1 of the Code Supplement and section 1103 of the Code, we said:

The section clearly creates a tribunal for the determination of all questions arising in relation to certificates of nomination or nomination papers, and makes the decision of such tribunal final. . . . The purpose of the statute is to afford a prompt review of all questions concerning the validity of certificates of nomination or nomination papers; and the provision making the decision final was undoubtedly intended to avoid delay and the complications sometimes incident to general judicial proceedings. In his discussion of this statute the appellee overlooks its broad language, and is mistaken when he says that the tribunal created thereby can only act when written objections are filed to nomination papers already filed. Under the construction contended for, no objections could be filed or any question raised until after filing, no matter how incomplete or insufficient the papers offered might be. In other words, the secretary would be compelled under the appellee's construction to file everything offered, and such a result was clearly not contemplated by the lawmakers. The secretary evidently refused to file the appellee's papers upon the ground that no legal nomination had been made. This action might have been questioned or objected to by the appellee in the manner pointed out by the statute, and, he having failed to take such action, the secretary's action must be held final.

As the board of supervisors had undoubted power to district the county after the primaries were held, and did so in this case, the nomination of plaintiff, at the primary elec-

tion, for member of the board at large and not for his district, which was thereafter created, is not to be regarded as a nomination for the district subsequently created, and it is manifest that there was a vacancy to be filled by the proper authority after the districting of the county. Aside from the judgment and decree in the *mandamus* case, it seems to us that this vacancy should have been filled as provided in section 1087a24 of the Code Supplement—by the party committee. It is doubtful if section 1100 of the Code, providing for nominations by petition, applies; but, as that point is not involved, we shall not now determine it. We have held that section 1102 of the Code, hitherto quoted, is repealed by implication by section 1087a24 of the Code Supplement, and vacancies from any cause are by that section to be filled by the party committee for the county. It is barely possible that under some of the sections quoted and section 1089 of the Code, which provides for nominations by party conventions, a nomination might have been made by a party convention called for that purpose; but, as this was not done, we have no occasion to do more now than suggest a possibility, without in any manner indicating that this course should have been followed. All that need be decided now is that plaintiff was not properly nominated for member of the board from the district which was created by proper authority after the primary was held and after the certificate of nomination was issued. If plaintiff's name had not been printed upon the ballot, he would have no cause to complain. But it was printed thereon by order of the district court in an action properly brought to determine that question, and plaintiff not only received the largest vote cast at the election in the county at large, but also in the district created by the board in which he at that time resided. The question resolves itself down to this: What effect is to be given the judgment and order of the district

2. SAME: nomination of supervisors:
vacancies: how filled.

court directing that plaintiff's name be placed upon the ballot as a candidate for member of the board of supervisors. It was not ordered placed thereon as a candidate for member of the board from the new district, but as a member at large, although he did receive, at the election, the largest number of votes from his district, as found and determined by the county election board, but the certificate of election was issued to him as a member of the board for the county at large, and not for any particular district. Counsel for appellant contend that the decree of the district court in the *mandamus* case is final and conclusive, and that relator should be found to be elected to the office in virtue thereof. If the trial court had ordered plaintiff's name printed upon the ballot as a candidate for member of the board from the district in which relator resided, there would be much force in the position. But this, as has been observed, was not the order; nor was relator elected to that office.

Counsel for appellee broadly contend, however, and the trial court found, that the district court had no jurisdiction of the *mandamus* proceeding, and that *certiorari*

3. **ELECTIONS:**
mandamus:
the placing
of name of
candidate on
ballot. was the proper remedy. *Certiorari* will lie only when an inferior board or tribunal exercising judicial functions is alleged to have exceeded its proper jurisdiction or is otherwise acting illegally and there is no other plain, speedy, and adequate remedy. Code, section 4154. The writ does not lie to correct a mere error, but only to test the jurisdiction of a tribunal and the legality of its action. *State v. Roney*, 37 Iowa, 30. The proceedings of the board of supervisors in redistricting or districting Mills County for supervisor purposes was largely, if not wholly, legislative in character. True, there were some questions for it to determine, as, for instance, the population of the proposed districts and what was contiguous territory. Perhaps, if these matters had been challenged, a writ of cer-

tiorari might have been sued out to determine the legality of its action in the premises. But that was not the nature of plaintiff's *mandamus* suit. That suit was brought to compel the auditor to place plaintiff's (relator's) name upon the ticket. Now, the action of *mandamus* may be brought to obtain an order commanding an inferior board or person to do or not to do an act, the performance or omission of which the law enjoins as a duty from an office, trust, or station. When discretion is left to such board or person, the *mandamus* can only compel it to act, but can not control such discretion. Code, section 4341. That *mandamus*, and not *certiorari*, was the proper remedy whereby to procure an order on the auditor to place plaintiff's name on the ballot, is well established by authority. *People v. Board*, 138 N. Y. 95 (33 N. E. 827, 20 L. R. A. 81); *Bennett v. Richards* (Ky.) 83 S. W. 154; *Roemer v. City Canvassers*, 90 Mich. 27 (51 N. W. 267); *Hutchinson v. Brown, Secy.*, 122 Cal. 189 (54 Pac. 738, 42 L. R. A. 232); *State ex rel. v. Cunningham*, 83 Wis. 90 (53 N. W. 35, 17 L. R. A. 145, 35 Am. St. Rep. 27); *Giddings v. Blacker*, 93 Mich. 1 (52 N. W. 944, 16 L. R. A. 402); *People v. Thompson*, 155 Ill. 451 (40 N. E. 307).

The action of the board of supervisors was but incidentally involved. That is to say, it was claimed that it had no power to district or redistrict the county, after the primary election was held, in such a manner as to affect the rights of nominees at large chosen at a primary held before the act of redistricting was performed. The action was against the county auditor to compel him to place plaintiff's name upon the official ballot as a candidate for member of the board. This was clearly to require him to perform a duty enjoined upon him by law, and, unless there be something in the point that the court had no jurisdiction whatever because such matter was intrusted to another tribunal whose jurisdiction was

and is final, there can be no doubt that the action of *mandamus* was properly commenced and prosecuted to a conclusion. So that we are eventually brought down to the exact proposition for decision in this case: Was the district court of Mills County without jurisdiction in the matter because another tribunal or tribunals were created to settle such disputes whose decisions were and are final and conclusive? This is affirmed on one side and denied on the other.

By section 1087a19, Code. Supp., it is provided that the certificate of nomination from the board of supervisors shall be final as to all candidates for nomination to any

~~4. SAME: certificate of nomination: finality: judicial review.~~ elective county office or office of a subdivision of a county. And by sections 1103 and 1104 of the Code it is provided that

all objections arising in relation to certificates of nomination or nomination papers shall be filed with the officer with whom the certificate is to be filed. Objections filed with the county auditor shall be considered by the auditor, clerk, and county attorney, and a majority decision shall be final. Provision is also made for notices, etc., to parties in interest, a hearing, etc., and it is further provided that certificates apparently in conformity to law shall be regarded as final, unless objection be made thereto in writing. Ordinarily, the certificate of nomination issued by the board would be regarded as final, unless objection was filed thereto under sections. 1103 and 1104 of the Code. But in the present case the certificate was to the effect that plaintiff had been nominated for the office of member of the board for the county at large, when as a matter of fact there was no such office to be filled at the coming election. As a vacancy was created by act of the board after the certificate was issued, that certificate can not be regarded as controlling. On the other hand, no objections were filed with the county auditor to relator's certificate of nomination, and no notice of a hear-

ing or a hearing was ever had upon the question of his being properly nominated and entitled to have his name placed upon the ticket by the tribunal created for that purpose under sections 1103 and 1104 of the Code before quoted. If plaintiff (relator) had been nominted for member of the board for the district in which he lived, we would have no doubt of his right to maintain the present suit. His right to have his name placed upon the ticket for the election was never questioned by any one save the auditor, and this was no doubt for the reason that he had never been nominated for the office which the electors were to fill. The board of supervisors issued to relator a certificate to the effect that he had been nominated for the office of the member of the board at large. After that date the board dispensed with that office by creating districts as it had a right to do, and plaintiff (relator) was never nominated for that office. No one ever filed any objections to his nomination papers; but the county auditor undoubtedly held that, as plaintiff had not been nominated for member of the board for one of the districts, his name should not go upon the official ballot. The trial court took a different view, and held that plaintiff's name should have gone upon the ticket as a candidate for member of the board at large, and it was so printed upon the official ballot. Plaintiff was then elected to the office of member of the board, and incidentally he had a majority of the votes in the district where he resided. Had relator been nominated for an office which was to be filled at the coming election, and objections had been filed with the county auditor, and that official had given notice, and a hearing had been had, or had the case been one where objections might have been filed, but were not, perhaps under the doctrine of the *Hayward* case *supra*, the conclusion reached by the auditor or by the auditor, county attorney, and clerk would have been final, although we are not disposed to carry the doctrine of the *Hayward* case any further than the

facts will justify. If no objections were filed, and relator had been nominated for the office to which he was thereafter elected, it is doubtless true that the courts would have no right to interfere in the matter. But the case does not seem to present this aspect.

Plaintiff and relator's nomination was not for member of the board from a given district, but for member of the board generally, and the trial court in the *mandamus* case did not find that he had been nominated for the district in which he now claims to have been elected. The holding was that his name was to go on the ticket as a candidate for member of the board at large, and his name so went upon the ticket. He was elected to that office, but when the election was held there was no such office to fill. It is manifest that a court can not create an office by a declaration and decree that a name shall go on a ticket for that office. To give such an effect to a decree would be to invest courts with the legislative power of creating an office. Plaintiff, as has been observed, was not a candidate for member of the board from a given district, and the mere fact that he claimed to have received a majority of votes therein does not entitle him to hold the office. Had he received a majority of the votes of the county—which he unquestionably did—he would have been elected to the office for which he ran, although he may have been defeated in his particular district. The *mandamus* decree is not conclusive, then, of plaintiff's right to hold an office to which he was not elected, and for which he was not a candidate. Had he been a candidate for office in a supervisor district, we should have a much more difficult question in view of the decision in the *mandamus* case. We feel quite clear that if this had been the situation the decree in the *mandamus* case would have been conclusive. The decision of the county officials is only conclusive when objections are filed and they are called upon to act. If no objections are filed, as provided in the section of the

Code quoted, we think it quite clear that a court might by *mandamus*, compel the auditor to place the name of a candidate who held a certificate of nomination upon the ticket. This would be a duty devolving upon him in virtue of his office. The case is peculiar in its facts. Here a vacancy was created after the primary election was held. Plaintiff (relator) was never nominated for that vacancy. He went into court, however, and secured an order placing his name upon the ticket for member of the board of supervisors at large. He was voted for as such by all the electors and secured a certificate of election, having received a large majority of the votes. He also had more votes than any other candidate in the district where he resided; but he was not a candidate for that office, and the district court did not so hold. This decision is, of course, upon the peculiar facts of the case, and is sustained, we think, by the statutes quoted and the rules heretofore announced. Reliance is placed upon *State v. Hayward, supra*; but we do not regard it as controlling. What is there said must be considered with reference to the peculiar facts of that case. There are no adjudicated cases exactly in point; but the following give some support to our conclusions: See *Carl v. Knott*, 16 Iowa, 379; *Merrill v. Tobin*, 82 Iowa, 533; *McCullough v. Connelly*, 137 Iowa, 682.

But relator's counsel strenuously insist that in reaching the conclusion that it did in the *mandamus* case the trial court held that the redistricting resolution was ineffective,

and that this conclusion is final and can not be questioned in this proceeding. It is doubtless true that the court hearing the *mandamus* case, as a basis for its conclusion that plaintiff's name should go upon the ticket, found that the redistricting resolution was either invalid, or that its operation should be postponed until after the election to be held in the fall of that year. This, however, was nothing more than an argument or reason given for ordering the county

5. SAME judgments: conclusiveness.

auditor to place plaintiff's name upon the ticket. It amounted, in our opinion, to nothing more than a placing of plaintiff's name upon the ticket voluntarily and without action brought. Surely, if the county auditor had voluntarily placed plaintiff's name upon the ticket because he thought that it was entitled to go there, his act in so doing would not entitle plaintiff to hold an office to which he was not elected and for which he was not a candidate. Neither the courts nor a county auditor, nor both together, can create an office and so order that one may be elected thereto. No one but the Legislature, or somebody acting under its authority, can create an office. In this case the board created an office; that is to say, an officer who could be elected by only a certain part of the electors. To fill that office one had to be a candidate therefor. If he was not such candidate, but was a candidate for some other position or a position to be filled by the electors of a given locality, he can not, after being elected to that office, claim that he is entitled to another. The question of redistricting was only incidentally involved in the *mandamus* proceeding, and, as we have said, the only real question in that case was: Should plaintiff's (relator's) name go up on the ticket as a candidate for member at large of the board of supervisors? The trial court held that it should. It now turns out that there was no such office to be filled, and plaintiff is in no position to say he was elected thereto. As already observed *mandamus* is not the proper remedy for challenging directly the action of the board of supervisors in passing the resolution for districting the county. But it was a proper remedy to compel the auditor to do his duty. As *mandamus* was not the proper remedy whereby to challenge the validity of the resolution for districting the county, no one was bound by the *mandamus* proceeding, save the auditor. He was bound, and he complied with the order of the court. It now turns out, however, that, while plaintiff's name went upon the ticket, he

was not a candidate for an office to be filled by the electors at large, and, although he had a majority of the votes and a certificate of election, it was for an office which had been properly abolished, and, as there was no office to fill, plaintiff was not elected to one. We have said perhaps more than we should upon this question; but as it is the turning point in the case, and counsel place great reliance thereon, attempt has been made to show the ineffectiveness of the judgment in the *mandamus* case as a former adjudication conclusive on every one. That there is a manifest distinction between a *mandamus* proceeding and an action of *certiorari* in their effect upon others than the parties to the action is already sufficiently pointed out, and it is fundamental, of course, that courts can not create offices or declare persons elected thereto who have never been candidates therefor.

The decree dismissing the petition seems to be correct, and it must be, and it is, *affirmed*.

SWIFT & COMPANY, Appellant, v. C. W. REDHEAD.

Sales: FAILURE OF CONSIDERATION. Where, as in this case, stock food
1 was sold for a particular purpose and upon representations that
it was suitable for that purpose, upon which the purchaser relied,
and which proved to be of no value for such use, there was a
total failure of consideration.

Same: EVIDENCE. In this action for the price of stock food the evi-
2 dence is held to sustain a finding that the same was not suitable
for the purpose of fattening cattle as represented by the seller,
but was in fact injurious and worthless for that purpose.

Same: WARRANTY. No particular form of words is necessary to
3 constitute a warranty; it only being necessary that the parties
understood from their conversation that a warranty was intended.

Same: EVIDENCE. In this action the evidence is held sufficient to
4 take the question of whether the seller warranted the stock food
to be suitable for fattening cattle to the jury.

Same: BREACH OF WARRANTY: DAMAGES. In an action for the price 5 of stock food sold on a warranty that it was suitable for fattening cattle, the defendant is entitled to recover the damages naturally growing out of the breach of warranty; so that while he can not recover anticipated profits growing out of the use of the food, there being no representation as to the amount of such profits, he can recover damages caused by using the food, where the evidence shows that his cattle lost flesh when fed upon it and gained flesh when using other ordinary feed; such evidence showing damage with reasonable certainty.

Same: WAIVER OF RIGHT TO DAMAGES: EVIDENCE. A purchaser of 6 stock food can not recover damages caused by feeding the same after he fully learned of its injurious effects, even though advised by the agent of the seller to keep trying it and see if he could not determine the right amount to use; the agent not being authorized to give such advice and it being merely advice to experiment with the same. In this action the evidence is held to show that defendant learned of the injurious effects of the food shortly after using it and that he continued to feed the same with such knowledge.

Same: EVIDENCE: ADMISSIONS OF AGENT. Statements of plaintiff's 7 agent concerning the quality of the stock food and its continued use, made long after the sale and when he was not engaged in the performance of any duty within the scope of his employment, were not binding upon the plaintiff. And as he had neither examined the food, nor investigated the condition of the cattle to which it had been fed, as defendant knew, and had given no opinion of its effect based on information, his advice to keep trying it and see if the right amount to feed could not be determined, amounted simply to a suggestion that defendant conduct an experiment; and evidence of such suggestion was not admissible as bearing on defendant's conduct in continuing to use the food after discovering its injurious effects.

Appeal from Polk District Court.—Hon. JESSE A. MILLER, Judge.

THURSDAY, JULY 1, 1909.

REHEARING DENIED, MONDAY, APRIL 11, 1910.

On December 24, 1903, the defendant purchased of

plaintiff, through its agent, Hugh Van Pelt, about eight tons of blood meal at the agreed price of \$383.52. The action was brought for this sum. For answer the defendant alleged: That the consideration had wholly failed, in that the so-called merchandise was a prepared form of the blood of domestic animals, represented by the plaintiff to be exceedingly valuable as a food for cattle, causing them to be and remain healthy and to rapidly take on fat and mature for market; that the same was a new product recently placed upon the market, the qualities of which were unknown to the defendant, and the plaintiff knew at the time that he ordered the same that he was wholly unfamiliar therewith:

And it was distinctly understood and agreed that he was not buying the same upon his own knowledge, but upon the knowledge, representations, and warranties of the plaintiff that the same was suitable, valuable, and profitable for the use aforesaid; that the defendant attempted to make such use thereof, carefully following the directions and instructions of the plaintiff in that behalf, but found, after giving the same a fair test, that the same was not only wholly worthless for such purpose, but was a positive injury and damage to his cattle. Whereupon he notified plaintiff of such facts and notified it that the remainder of said blood meal was in his custody subject to the order of the plaintiff and its officers, and so remained.

By way of counterclaim, it was averred: That plaintiff represented and warranted that said meal was scientifically prepared stock food, valuable and healthful, and would cause feeding cattle to become healthful and remain healthful and thrifty and accumulate fat much more rapidly than had been possible as the result of methods of feeding and treatment that generally prevailed up to the time of the invention and manufacture of such blood meal; that the defendant purchased said meal in reliance upon said representations and warranties for the purpose

of feeding a herd of some one hundred and twenty-one head of cattle then being prepared for the market; that plaintiff knew that such was the object of the purpose, and sold the same on said representations and warranties with knowledge that defendant was without information and relying thereon; that defendant in feeding said meal followed instructions, but it caused said cattle to sicken, suffer from scours, with the result that it retarded the acquisition of fat; that defendant then rescinded the contract of purchase; that the cattle were worth \$4,830 less upon discontinuing the feeding of the meal than they would have been had it not been fed at all; and judgment was prayed for \$1,615. In reply plaintiff interposed a general denial and averred that both parties acted with knowledge of the use and results of said meal, and there was no warranty as alleged. The trial resulted in a verdict and judgment as prayed in the counterclaim. The plaintiff appeals.—*Affirmed* on condition.

B. F. Taft and Sullivan & Sullivan, for appellant.

Crom Bowen and O. M. Brockett, for appellee.

LADD, J.—The defendant began feeding one hundred and forty three-year-old steers about December 1, 1903. They were grade short horns, polled Angus and Herefords, taken from the pasture in good condition. He began feeding them blood meal in the latter part of the month, up to which time the evidence tended to show they were thrifty and doing well. Thereafter, though well cared for, they scoured badly, and this continued as long as the meal was fed, which was about until the first of March, and thereupon the scouring ceased. According to the evidence, the cattle did not increase in weight to exceed seventy-five to one hundred pounds each during the sixty days they were given the blood meal; whereas, without

such food, like cattle ordinarily increase on full feed from one hundred and twenty to one hundred and fifty pounds a head in that time. It was also made to appear that, as such cattle fattened, they increase in value per pound. On this showing, in connection with other evidence, which will be referred to farther on, defendant asserted: (1) That the blood meal had proven to be utterly valueless, and therefore the consideration wholly failed; and (2) that he was entitled to recover the damages caused by feeding the same, measured as difference in the market value of the cattle at the end of sixty days' feeding thereof and such value of the cattle had such food not been given them. The jury might have found: That at that time "blood meal" was a comparatively recent preparation; that, though defendant knew of it in a general way, he had never used it and bought it to feed the "bunch" of cattle he then had on the recommendation of the plaintiff's agent; that the agent in selling it so knew and represented that it was a valuable food for cattle and would cause them to continue healthy and rapidly take on fat.

I. As the sale was made for a specific purpose, on the assurance of the seller that the commodity with which 1. ^{SALES: failure of consideration.} the purchaser was unfamiliar, as was well known to the seller, was suitable for the purpose for which sold, and the purchaser in buying relied thereon, it goes without saying that, unless the article was of some value for such use there was a failure of consideration.

From the evidence adduced, the jury might have found not only that the "batch" of "blood meal" shipped to defendant was not suitable for cattle food, but that 2. ^{SAME: evidence.} it was injurious to them, and therefore worthless for the purpose sold. This being so, the consideration as to that fed failed, and no recovery can be had for that on hand, as the jury also must have found that defendant advised plaintiff that the por-

tion not fed was retained subject to its order. The second instruction was to this effect, and we do not understand counsel in their brief to challenge its correctness. If anything said under the heading "points in error" can be so construed, the point was not argued nor authorities cited thereon.

II. The counterclaim for damages was based on allegations of an express warranty, and the sufficiency of the evidence to sustain the verdict finding there was such a

3. ~~SAME:~~ warranty is challenged. No particular form of words is necessarily to be employed in order to constitute a warranty. All essential is that such was the understanding of the parties.

Here the evidence of defendant was that the agent recommended the blood meal very highly, and said that it was very fine food for cattle, that many were using it,

4. ~~SAME:~~ evidence. that it was valuable in preventing scours in calves, that it was a great deal better than

cotton seed meal or oil meal and would produce flesh much quicker, that he had used it himself in feeding, that it would cause cattle to take on fat much more rapidly and keep them in good condition, that he figured out "how much quicker they would be ready for market and how much more they would gain." The agent denied having stated what effect the meal would have on cattle, or having compared it with cotton seed or linseed oil; but he admitted that he knew defendant was contemplating the purchase of cotton seed meal, that he pointed out the excess of protein in blood meal over cotton seed meal and induced him to purchase the blood meal, that he said blood meal was a preventive and cure for scours, and that he had practical knowledge on the subject. Quoting from his testimony:

I showed him where the Iowa Experiment Station had fed different bunches of steers with corn alone and with different commercial food, and in showing him this

I showed him that blood meal produced more profit than any other food fed in conjunction with grain, and further showing him Swift & Co. guaranteed eighty-seven percent of protein, which was a great deal larger percent than any other food stuff had, and that protein was evidently what he was wishing to buy when he bought cotton seed meal which contained thirty-seven percent, and blood meal contained eighty-seven percent and the difference on the total amount of protein contained in a ton of blood meal and a ton of cotton seed meal made blood meal the cheaper source of protein at the price at which I was selling it to him to be used in connection with their food to produce and maintain a healthful condition and facilitate the taking on of fat and to balance up the rations. Q. Did you tell him that the manufacturers represented this food contained this protein in this proportion and in such condition as that it could be used in connection with the other food as to get the proper balance or proportion of food ingredients and facilitate the maturity of the cattle for the market? A. When fed with corn. Q. Did you represent to him as your claim and the claim of the manufacturers that it was profitable to use this food in connection with the corn and other cattle foods, because so used it would cause the cattle to get fatter in the same length of time or else fatten quicker for the market? A. From what I said to him, he naturally would draw that conclusion. Q. That was one way to get him to buy, was it not? A. Certainly.

When to this evidence is added the circumstance that the agent was aware that defendant was without experience in the use of the meal, and was relying on his representations in making the purchase, it becomes evident that there was enough to carry the issue to the jury. *Hughes v. Funston*, 23 Iowa, 257; *Tewkesbury v. Bennett*, 31 Iowa, 83; *Conklin v. Standard Oil Co.*, 138 Iowa, 596. The jury might well have found that the purchase of the blood meal for a particular use known to the seller, and for which the latter assured the buyer it was suitable, and that the buyer relied thereon, and, if so, this amounted to a warranty that the article in ques-

tion was reasonably fit for the use both contemplated. 30 Am. & Eng. Ency. of Law, 144. Practically, this is as far as a warranty of merchandise ordinarily goes, and, aside from estimating the advantages of the commodity in detail, is as far as the plaintiff's representative went in this case. The object to be attained was the fattening of the cattle. The agent represented that the blood meal would accelerate the fattening, but did not indicate how much. So that what he said amounted to no more than a warranty that it was suitable for that purpose. If it was not suitable, and we are speaking of the blood meal actually delivered, and not of the preparation generally, then his principal is responsible for the consequences naturally flowing from a breach of the contract. But three of these can be conceived of, namely, the meal must have improved their condition, have injured them, or have produced no effect whatever; and surely these are consequences which the parties must have contemplated in making the bargain. In other words, the object of the contract was that the meal sold produced a particular effect, i. e., the laying on of fat by the cattle faster than they would without it, and thereby enhance the defendant's profits from feeding.

Of course, defendant could not recover for loss of the anticipated increase in profits, for there was no assurance as to the amount, and he is making no claim

<sup>5. SAME: breach
of warranty:
damages.</sup> therefor. What he is demanding is the loss of profits which would have accrued from feeding in the ordinary way, but for the consumption of the blood meal; that is, for the injury occasioned by feeding an article not as warranted. Appellant contends that the damages, if any, are too uncertain and speculative for adjudication. Such is not the holding of the courts where injury has resulted from the use of an article warranted to be beneficial. As said, the claim is not for profits lost, but for damages due to the inter-

ference with the growth of the animals. That they in fact increased in value when on full feed is not conclusive that eating the meal did not cause the injury complained of.

The law does not preclude the recovery of profits lost as the result of a breach of a contract having these as its object. *Hichorn v. Bradley*, 117 Iowa, 130; *Rule v. McGregor*, 117 Iowa, 419. See *Creamery Package Mfg. Co. v. Benton Co. Creamery*, 120 Iowa, 584. Nor does it deny to one who has purchased an article for a specific purpose damages naturally consequent upon it proving not to be as agreed. Thus in *Kent v. Halliday*, 23 R. I. 182 (49 Atl. 700), the petition alleged a warranty in the sale of paris green that it was pure and would kill potato bugs, that upon proper application it proved impure and not sufficiently strong to kill them, and that in consequence thereof plaintiff's potato crop was destroyed. The court held that a good cause of action was stated; it being a matter for determination on the trial whether the destruction of the crop was the natural and proximate consequence of the breach of warranty. *White v. Miller*, 71 N. Y. 118 (27 Am. Rep. 13), was an action on a warranty that a quantity of cabbage seed sold was pure, and, as the seed turned out to be impure, loss of probable profits was allowed; the court saying: "Gains prevented, as well as losses sustained, may be recovered as damages for a breach of contract where they can be rendered reasonably certain by evidence, and have naturally resulted from the breach. . . . The character of the season, whether favorable or unfavorable for production, the manner in which the plants set were cultivated, the condition of the ground, the results observed in the same vicinity where cabbages were planted under similar circumstances, the market value of Bristol cabbages when the crop matured, the value of the crop raised from defective seeds, these, and other circumstances, may be shown

to aid the jury and from which they can ascertain approximately the extent of the damages resulting from the loss of a crop of a particular kind." The decision no more than confirms *Passinger v. Thorburn*, 34 N. Y. 634 (90 Am. Dec. 753), where, in an action on a breach of warranty on sale of Bristol cabbage seed, complainant was allowed to recover as damages the difference between a crop raised from the defective seed and a crop of Bristol cabbage such as would ordinarily have been produced in the year in which the seed was to be sown. A like holding based on a sale of seed barley was had in *Randall v. Roper*, E. B. & E. 84. See, also, *Wolcott v. Mount*, 36 N. J. Law, 262 (13 Am. Rep. 438); *Ferris v. Comstock*, 33 Conn. 513; *Swain v. Schieffelin*, 134 N. Y. 471 (31 N. E. 1025, 18 L. R. A. 385). In *Jones v. George*, 56 Tex. 149 (42 Am. Rep. 689), the sale was of paris green to kill worms, and the court, though holding that recovery might be had on showing of breach of implied warranty for cost in purchase and application to cotton and loss of time and all other damages resulting as a natural consequence, but that what the cotton crop would have been had the worms been destroyed was purely conjectural and not to be taken into account.

No consideration was given to the foregoing and other authorities, however, and we need not stop to determine whether, in view of the circumstances of the case the conclusion is to be approved. It is very evident that a showing of damages to stock due to a particular feed is not involved in the uncertainties attendant upon the raising of a crop of barley, cabbage, potatoes, or cotton. The testimony of what cattle like those of defendant on full feed ordinarily would increase was undisputed, as was the evidence of what they in fact increased. It was shown that they had not scoured before eating the blood meal, that they did scour during the entire time it was fed to them, and that they ceased scouring when it was

finally taken from them. The care and feed otherwise was not changed, so that the inference fairly to be drawn was that their condition was caused by this feed, and that it had interfered with their growth to the extent indicated. As the cause was reasonably certain, the mere difficulty in ascertaining or measuring the damage will not justify the denial of the recovery thereof.

III. Conceding, however, that defendant might recover on proof of injury to the cattle, the evidence conclusively showed that he was aware of the injurious effect

due to eating the blood meal within two days after he began feeding it. He testified that as long as he fed it the cattle scoured, and that they "did not seem to do any good at all," that he kept "thinking it would work all right, wanted to use the food if he possibly could, and thereafter kept on trying it, giving them little, and increasing it a little, trying in every way to get them to take the food so that it would do them some good." He testified further: "Just as soon as the cattle got the blood food, they commenced to scour. I should say within two days afterwards. I knew that something was acting bad with them and attributed it to the blood meal. We were only feeding them corn and hay at this time. As I said, we noticed the bad effect within two days; but we did not lessen or stop the use of the meal. In fact, we kept increasing it gradually. We could not get much relief in its effect, as they were just as bad on the start as they were later. It continued very bad, but I was trying the meal. . . . Until about the 23d of March, we used the blood meal, increasing and decreasing it off and on. It acted badly all the time. The only deleterious effect on the cattle shown was causing them to scour." This is that for which agent of plaintiff had expressly recommended the blood meal to be a preventative. Within a few days after receiving it, the defendant was as fully

6. SAME:
waiver of
right to
damages:
evidence.

advised as he was three months thereafter that the blood meal had precisely the opposite effect. Having information that the commodity was not as recommended, he must be held to have conducted the series of experiments following at his own risk. Surely the seller can not be held for damages flowing from the experiments of the feeder after he has become fully aware of the breach of the warranty. Doubtless, defendant was justified in continuing the feed for a short time reasonably sufficient to ascertain the result of its use; but, after this was definitely known, the seller ought not to be held responsible for any damage caused by feeding blood meal. The record affords no basis for a finding of damages, if any, which resulted from using the meal until the defendant knew of its effect on the cattle; the only proof bearing on the measure of damages indicating the difference in the value of the cattle about March 23d as they were and as they would have been but for the use of the meal. At the most, under the circumstances disclosed, defendant was entitled to no more than nominal damages.

IV. Evidence of declarations by plaintiff's agent, made several weeks after the sale was effected, was received over objection. Upon defendant's
7. ^{SAME:} _{evidence: admission by agent.} complaint that the blood meal caused the cattle to scour, the agent appears to have said that something must be wrong with it, but advised defendant to continue feeding it. In an instruction the court limited the consideration of this evidence to "determining the question as to what time the defendant, acting as a reasonably prudent man, should have discontinued the use of said blood meal after he ascertained how it affected the cattle." What the agent said was not binding on the plaintiff, for he was not then engaged in the performance of any duty within the scope of his employment. *Phelps v. James*, 86 Iowa, 398; *Sweetland v. Tel. Co.*, 27 Iowa, 433; *Metropolitan Bank v. Nat. Bank*,

104 Iowa, 682. It is insisted, however, that, as bearing on the defendant's conduct, what others might have said to him would have a material bearing on whether he acted prudently in continuing to feed the meal. Had the agent examined the meal, or had he investigated the condition of the cattle and given an opinion based on information, the case might have been different; but he had done neither, and, as he recognized the bad effects of the meal, his advice amounted to nothing else than suggesting to defendant that he experiment with the food. His advice to "keep trying it," and see if he could "get them up to the right amount," furnished no justification for defendant to continue in the use of the blood meal two or three months after he was fully aware of its injurious effects. As the advice of the agent was that defendant conduct an experiment, and not that the meal was good, or that the cattle were likely, in becoming accustomed to it, to do as had been assured in making the sale, evidence thereof was not admissible for the purpose mentioned in the instruction or any other.

V. Much is said in the argument of appellant concerning the general character of blood meal. We are not concerned in this case as to whether, as an article of food for animals, it is valuable or otherwise. Plaintiff was bound to furnish the commodity in compliance with the expressed warranty, if such there was, regardless of the character of the preparation generally, and this, as the evidence tended to show, it did not do.

Other matters argued, in view of our conclusion, need not be considered.

The result is that the finding that the consideration failed is sustained by the evidence, and that the verdict, in so far as based on the counterclaim, is not so sustained. If defendant shall elect to file a remittitur of the judgment in his favor in excess of nominal damages of \$1 within thirty days after the filing of this opinion, the judgment

will be affirmed with one-half of the costs taxed to each party; otherwise the judgment will be reversed.

Affirmed on condition.

LIVE STOCK NATIONAL BANK OF SIOUX CITY, IOWA, Appellant, v. J. M. COLLINS, JENNIE M. COLLINS, ET AL., Appellees, and J. M. COLLINS and JENNIE M. COLLINS, Cross-Petitioners, Appellants.

Mortgages: PRIORITY OF LIENS: CONTRACTS FOR COMPOUNDING OFFENSES.

In this action two commission men guilty of fraud in selling the cattle of an owner at less than he was to receive, agreed to pay the owner the value of the cattle and an additional sum as expenses in settlement of his claim, each to pay one-half thereof. A third party borrowed the money necessary to make the payment and received a note and mortgage from one of the commission men to pay the amount which he was to furnish, and arranged with others for the payment of the loan. *Held*, that the notes and mortgage were the absolute property of such third person and not held by him as collateral, and that his mortgage was superior to a junior mortgage.

It is also held that the agreement for settlement was not within the provisions of the code prohibiting an agreement to compound or to conceal an offense or to abstain from a prosecution thereof.

Appeal from Winneshiek District Court.—Hon. L. E. FELLOWS, Judge.

TUESDAY, JANUARY 11, 1910.

REHEARING DENIED, MONDAY, APRIL 11, 1910.

THE opinion states the case.—*Affirmed*.

N. Willett, Milchrist & Scott, and John R. Carter,
for appellant.

D. H. Sullivan, and Wolfe & Wolfe, for appellees.

SHERWIN, J.—This action is in equity to set aside a judgment in favor of the defendant T. F. Griffin, and against his codefendants herein, J. M. and Jennie M. Collins. It is alleged that the judgment was procured by fraud, and that the note and mortgage upon which it was rendered were executed for the purpose of cheating and defrauding the creditors of the said defendants J. M. and Jennie M. Collins. It is further alleged, that the property covered by the foreclosed mortgage belonged to Jennie M. Collins, and that the note and mortgage given to said Griffin were to be used by him as collateral security for money he was to borrow for the use and benefit of J. M. Collins in compounding a felony. Separate answers were filed by Griffin, Weston, and J. M. and Jennie M. Collins. Jennie M. Collins pleaded that the note and mortgage were procured from her by duress, and they both pleaded that the note and mortgage were made and delivered as collateral security for \$7,840 borrowed of the First National Bank of Sioux City by one Flanders, and that said sum had been paid before the foreclosure of the mortgage. Other issues tendered by the pleadings will be noticed where necessary for a proper understanding of the case. The principal questions for determination herein are of fact; and, as they are at first glance somewhat complicated, we shall state them with more particularity than we otherwise would.

In 1904, and for some years prior thereto, a firm known as the Collins Commission Company was engaged in the live stock commission business at the Sioux City stockyards. The defendant J. M. Collins was a member of the company and the manager of its business. His wife, the defendant Jennie M. Collins, at times worked in the office of the company, acting as its clerk or book-keeper. In 1904 one W. S. Flanders was also in the live stock business in Sioux City. One P. H. O'Neill was a cattleman residing near Faulkton, S. D. In the fall of

1904 he shipped to the Collins Commission Company a large number of cattle, which were sold by said company at a price greatly below their market value, and the proceeds of the sale were accounted for. O'Neill claimed that he sold the cattle to the Collins Commission Company, while said company claimed that they were shipped to it to be sold on commission, and that they in fact were sold for \$8,000 or \$9,000 less than O'Neill claimed that he was to receive for them from the company. W. S. Flanders assisted O'Neill in finding a market for these cattle, and O'Neill paid him a certain amount per head for such assistance. After O'Neill had received returns for his cattle, he immediately brought suit against W. S. Flanders for the difference between the sum he had actually received for the cattle and the amount which he claimed he should have received. This suit was brought in South Dakota, and was aided by attaching certain land owned by Flanders. Still later, in February, 1905, O'Neill came to Sioux City and employed counsel to investigate the matter, and together they secured evidence tending to show that both Flanders and Collins had been guilty of fraud, if not of a crime, in the deal with O'Neill. The defendants J. M. and Jennie M. Collins were at this time living at St. Joseph, Mo. O'Neill through his counsel, however, found Flanders, and made a demand on him for \$12,000 on account of the transaction, which sum was nearly \$4,000 more than the balance claimed to be due for the cattle. Flanders at first refused to pay any sum, whereupon he was advised that the amount must be paid at once, or criminal proceedings would be instituted. Collins suspected from the first that there might be trouble over the matter, and before moving to St. Joseph he employed the law firm of Sullivan & Griffin to look after his interests should trouble arise. The same law firm was also employed by Flanders when the demand was made on him by O'Neill. The firm was

advised that it would be necessary to have Collins present for an adjustment of O'Neill's claim, and they sent for him. He came to Sioux City at once, and he and Flanders finally agreed to settle O'Neill's demand by paying him \$10,000 cash, which was about \$1,700 more than was due for the cattle alone. Of this amount something over \$2,000 was in the hands of an Omaha, Neb., commission firm, and the balance had to be raised by Flanders and Collins. It was agreed that each should pay one-half thereof. The whole amount which they were to pay had to be borrowed, and they both arranged to have Mr. Griffin, of the firm of Sullivan & Griffin, get it for them. Collins and Flanders had theretofore had a similar live stock transaction with one Jones, and he was also demanding a settlement thereof from them. They thought his demand could be settled for \$1,000, and in arranging for the loan to close up the O'Neill matter, this additional sum was provided for, and each was to pay \$500 thereof. Collins and Flanders were jointly indebted on a note held by one of the banks, and it was agreed between them that Collins should take care of the note, and that Flanders would equalize the matter by furnishing so much more of the money necessary to settle the O'Neill demand. Collins also owed the firm of Sullivan & Griffin \$500, and this was also to be taken care of. As a result of the agreements between Collins and Flanders, Collins was to actually furnish \$3,310 of the money necessary to settle the O'Neill demand, and Flanders the balance. And as a result of the other agreements Collins was to secure Griffin for such amount and an additional amount of \$1,000, which included the two items, the \$500 which it was thought would settle his share of the Jones demand, and the \$500 which he owed the firm of Sullivan & Griffin. In accordance with these several agreements Collins executed a promissory note to Griffin for \$4310, and to secure the payment thereof Jennie M. Collins exe-

cuted a mortgage on her interest in certain lands in Winneshiek County. Flanders was unable to personally secure Griffin, and his son, J. A. Flanders, came to his assistance. Griffin borrowed the necessary money, \$7,840, from the First National Bank of Sioux City, and gave a note therefor, signed by himself and J. A. Flanders; and a real estate mortgage securing the same executed by said J. A. Flanders. Griffin also deposited the note and mortgage given to him by Mr. and Mrs. Collins as collateral security for the loan. The \$7,840 note was made on the 25th day of February, 1905, and was due in thirty days. It was paid in June, 1905. Collins was unable to furnish any part of the amount, and J. A. Flanders and his brother Robert in fact furnished the entire amount to Griffin, who paid the note, and returned to J. A. Flanders his mortgage. Thereafter J. M. and Jennie M. Collins executed to the plaintiff bank their notes and a third mortgage on Mrs. Collins' interest in the Winneshiek County land, and still later Griffin commenced an action to foreclose the mortgage given to him by Mrs. Collins. The plaintiff bank was made a party defendant, and duly served with notice of suit. No defense was made to the action, and there was a judgment and a sale thereunder. The certificate of sale was thereafter assigned to the defendant Weston to secure an indebtedness due him from W. S., A. R., and J. A. Flanders on notes executed by them in September, 1905. The indebtedness for which these notes were given, however, was in no way connected with the O'Neill matter, so far as the record shows. The certificate was assigned to Weston under an agreement between J. A. Flanders and Griffin, as we understand the record.

The appellant claims that, after it received notice of the foreclosure suit of Griffin, its attorneys called upon Griffin for the purpose of finding out whether the mortgage was a valid one and the note secured thereby unpaid,

and was informed that such was the fact, that relying upon such representations no defense was interposed thereto, and that the representations were false and fraudulent. There is a conflict in the evidence as to whether such representations were in fact made. But if it be conceded that they were, we are of the opinion that they were not false or fraudulent, and that the foreclosure should not be set aside on account thereof. We have given the entire record the most careful examination and consideration, and we are firmly convinced therefrom that Griffin undertook to and did furnish the money to help Collins out of a situation that Collins at least supposed to be very dangerous. Under the agreement between Collins and Flanders Collins was to pay one-half of the balance to be paid to O'Neill, and Griffin agreed with Collins to furnish the money on his own credit. Collins was not lending his credit to help Flanders out of a bad situation. They were equally involved, so far as this record discloses, and each was taking care of his own end of the transaction. Neither of them could raise the money on his own credit or security, and hence Griffin undertook to raise it for them on his own credit. And he did do so with the assistance of J. A. Flanders. The Collins note and mortgage were given to Griffin to pay him for the amount which he was to furnish, and did in fact furnish, and pay over to O'Neill for Collins. Collins had the money thus paid out for him, and his note to Griffin and the mortgage given to secure the same were the absolute property of Griffin, and were not held by him as collateral security merely. Even W. S. Flanders was under no obligation to pay for Collins. And if J. A. Flanders, or some one else, furnished Griffin the money to take up the note given to the First National Bank, it could make no difference to Collins because he had already received full value for his note, in strict accord with their agreement. Any arrangement, therefore, which Griffin and J.

A. and Robert Flanders made for the payment of the note held by the bank, and the return therefor which should be made by Griffin, was a matter in no way concerning Collins or his creditors.

As we have heretofore said, Jennie M. Collins pleaded that the mortgage in question was executed by her under duress. The evidence does not sustain the claim. Nor is there evidence sustaining the claim that the note and mortgage in question were given for the purpose of compounding a felony. O'Neill had a valid claim for something over \$8,000, and compelled Collins and Flanders to pay him about \$1,700 for his trouble and expense in the matter. But there is nothing in the record tending to show that he entered into any such agreement as is prohibited by section 5301 of the Code, which punishes any one who agrees to "compound or conceal the offense, or to abstain from a prosecution therefor, or to withhold any evidence thereof." There is no question of contribution among wrong-doers in this case.

The judgment of the trial court is right, and it is *affirmed*.

EMMA JENKINS v. HAWKEYE COMMERCIAL MEN'S ASSOCIATION, Appellant.

Pleadings: AMENDMENT. A petition may be amended without leave of court prior to the filing of an answer.

Insurance: ACTIONS: VENUE. An action to compel the assessment of benefits under a death policy may be brought and maintained in the county where the insured died.

Beneficial insurance: DEATH FROM "EXTERNAL, VIOLENT AND ACCIDENTAL MEANS." The term "external, violent and accidental means," as used in a benefit certificate with reference to the cause of death, has reference to the unnatural or improbable consequence of the means which produced the death; thus, where a deceased died

as the result of having swallowed a fish bone which lodged in the intestines, causing inflammation of the parts and a wound producing death, although death resulted directly from blood poison, was accidental within the meaning of the certificate.

Pleadings: MOTION TO STRIKE: PREJUDICE. Where a party is entitled
4 to recover under the pleadings and proof as made, error in ruling upon a motion to strike parts of the pleadings is not prejudicial.

Accidental death: AFFIRMATIVE PROOF. Affirmative proof of death
5 as the proximate result of external, violent and accidental means, has reference to such evidence of the truth of the matters asserted as tend to establish them, regardless of its character, so as to show *prima facie* that death occurred and that it resulted from the cause stated.

Appeal from Dubuque District Court.—Hon. ROBERT BONSON, Judge.

TUESDAY, JANUARY 11, 1910.

REHEARING DENIED, MONDAY, APRIL 11, 1910.

ACTION in equity to require defendant to levy an assessment on its members and pay the proceeds thereof to plaintiff as beneficiary named in a certificate of insurance. Decree was entered as prayed. The defendant appeals.—*Affirmed.*

Bradford & Johnson, for appellant.

Hurd, Lenehan & Kiesel, for appellee.

LADD, J.—On August 20, 1906, George Jenkins became a member of the Hawkeye Commercial Men's Association. This entitled him, in event of being injured "through external, violent and accidental means," to certain specified benefits. If the bodily injuries so received "resulted in death within twenty-six weeks from said ac-

cident, the beneficiary named in his application for membership or his heirs if no beneficiary is named therein, shall be paid the proceeds of one assessment of two dollars upon each member in good standing but in no case shall such payment exceed the sum of five thousand dollars." He died August 26, 1907, and, the defendant having refused to levy an assessment or make any provision for the payment of the indemnity, this action to enforce compliance with the articles and by-laws of the association was begun in the district court of Dubuque County, April 22, 1908.

I. As no answer had been filed, the plaintiff had the right to amend his petition without leave and, having ^{1. PLEADINGS:} done so, the court rightly considered the amendment petition as amended in passing on the motion for change of venue. *Kay v. Pruden*, 101 Iowa, 60.

And as the loss occurred in Dubuque County, the action was maintainable there, and the application to transfer the cause to Marshall County, the location of defendant's main office, was rightly overruled. See section 3499, Code; *Prader v. Accident Association*, 95 Iowa, 149; *Matt v. Iowa Mut. Aid Ass'n*, 81 Iowa, 135. See *Grimes v. N. W. Legion of Honor*, 97 Iowa, 315.

II. The assured was sixty-one years of age, and in good health. He first complained of a severe pain in the rectum at about seven o'clock in the morning of April 22, 1906, when at his son's residence in Chicago, Ill., saying that something must have lodged there. He cleansed his hand, and, putting vaseline on his finger, inserted it in the rectum, and withdrew therefrom the rib of a fish one and one-half inches in length, and as large as a darning needle, tapering toward the end. Upon extracting his finger, it and the bone were bloody. He was a traveling passenger agent, and left on business

³ BENEFICIAL INSURANCE:
death from
"external,
violent and
accidental
means."

about an hour later, though still complaining of pain which his appearance indicated. He reached Dubuque the following day, and, on examination, Dr. Greene discovered a laceration of about three-eighths of an inch in length inside of the rectum, and through the mucous membrane. Dropping a bit of absorbent cotton in a solution of equal parts of chloride hydrate, tincture of iodine, and carbolic acid, he touched the wound with it, and advised the patient that he saw no cause for apprehension of serious danger, but that he should not move about more than necessary. Deceased returned the next day, complained that he had been obliged to attend to some business, was suffering pain, and asked for something to relieve him. This was given, with directions, and with advice to remain at home. The day following the physician found him in a high fever, unable to pass urine with the parts surrounding the anus swollen and suffering great pain. Two days later Dr. Lewis was called in consultation, and both physicians testified on the trial that death resulted from blood poisoning due to infection from the fish bone or deceased's finger in removing it. Conceding the facts to be as recited, defendant contends that they do not show death to have been the result "of external, violent and accidental means." It is to be kept in mind that the means, not the injury, must have been of the nature stated.

In *Healy v. Association*, 133 Ill. 556 (25 N. E. 52, 9 L. R. A. 371, 23 Am. St. Rep. 637), death by poison accidentally taken was held to be by violent and external means, and a like conclusion was reached in *Paul v. Traveler's Ins. Co.*, 112 N. Y. 472 (20 N. E. 347, 3 L. R. A. 443, 8 Am. St. Rep. 758), where the assured died from the accidental inhalation of illuminating gas. In *American Accident Co. v. Reigart*, 94 Ky. 547 (23 S. W. 191, 21 L. R. A. 651, 42 Am. St. Rep. 374), while the assured was eating, a piece of meat lodged in the wind pipe, causing death, and this was held to be

through violent and external means. *In Maryland Casualty Co. v. Hudgins* (Tex. Civ. App.), 72 S. W. 1047, the assured ate two raw oysters before discovering they were unsound, and his death was caused by these lodging in the upper part of the intestines, inflaming the mucous membrane, and causing the same to enlarge and obstruct the passage. The eating was held to be accidental; the court quoting with approval from 1 Cyc. 249: "Where, however, the effect is not the natural or probable consequence of the means which produce it—an effect which does not ordinarily follow, and can not be reasonably anticipated from the use of the means, or an effect which the actor did not intend to produce, and which he can not be charged with a design of producing—it is produced by accidental means." See definitions collected in *Carnes v. Ass'n*, 106 Iowa, 281. In *Miller v. Fidelity and Casualty Co.* (C. C.), 97 Fed. 836, the assured swallowed "certain hard, pointed, and resistant substances of wood," which so perforated the intestinal canal, the tissue of which had been weakened by illness, as to cause death, and the court declared these "to have been external, violent, and accidental means, for they originated outside of the body, and were accidentally violent, although the accidental effect took place within. The assurance is not, by the first clause quoted, limited to an external effect, nor to one beginning at the surface. The accidental operation of external means may be wholly internal."

These decisions and others which might be cited are sufficient warrant for a like decision in the case at bar. They proceed on the theory that the design of this provision of the policy is to guard the insurer against a liability upon a fraudulent claim of the insured for indemnity for bodily injuries of which the only evidence might be the word of the person, and that, as the terms of the policy are to be construed most strongly against the insurer, the means coming from outside the body,

though the injury be internal, should be regarded as external. There was no evidence of how the fish bone came to be in the rectum, and therefore it is presumed that it reached there in the ordinary course of nature as other excretions—through the alimentary canal. If it was likely to cause injury, then, as the assured is presumed to have given heed to the instincts of self-preservation, it is not to be inferred that he swallowed the bone voluntarily. See *Stephenson v. Ass'n*, 108 Iowa, 641; *Tackman v. Brotherhood*, 132 Iowa, 64. But, regardless of whether in eating the fish he may have carelessly swallowed the bone and all, it is to be said that indigestible materials ordinarily pass out of the system without injury or inconvenience. That this bone caught in the rectum and inflicted the wound was so out of the ordinary course of things as to constitute an accident. The effect was one which does not ordinarily follow, could not reasonably have been anticipated, and can not be charged to have resulted from design. Manifestly, then, it was within the well-recognized definitions of accident. Nor is this conclusion obviated by the circumstance that death resulted from septicaemia or blood poisoning. Without the accidental wound by the fish bone, blood poisoning would not have ensued, and therefore that disease was incidental to the wound. *Central Accident Ins. Co. v. Rembe*, 220 Ill. 151 (77 N. E. 123, 5 L. R. A. (N. S.) 933, 110 Am. St. Rep. 235); 5 Am. & Eng. Ann. Cas. 155; *Martin v. Indemnity Co.*, 151 N. Y. 94 (45 N. E. 379); *Western Com. Trav. Ass'n v. Smith*, 56 U. S. App. 393 (85 Fed. 401, 29 C. C. A. 223); *Aetna Life Ins. Co. v. Fitzgerald*, 165 Ind. 317 (75 N. E. 262, 1 L. R. A. (N. S.) 422, 112 Am. St. Rep. 232, 6 Am. & Eng. Ann. Cas. 551); *Cary v. Ins. Co.*, 127 Wis. 67 (106 N. W. 1055, 5 L. R. A. (N. S.) 926, 115 Am. St. Rep. 997 (7 Am. & Eng. Ann. Cas. 484.)

III. Our conclusion on the merits of the case obvi-

ates the necessity of reviewing the rulings on the motion
4. PLEADINGS: motion to strike portions of the answer, and on the
strike: demurrer to other portions thereof; for,
prejudice. were any of these found to be erroneous,
they could not have been prejudicial.

That the notice and proofs of loss were furnished in time appears from *Connell v. Iowa State Traveling Men's Ass'n*, 139 Iowa, 444, and the affidavits furnished defendant constituted "affirmative proof in writing of the death and of its being the proximate result of external and accidental means." By affirmative proof is meant such evidence of the truth of the matters asserted as tend to establish them, and this regardless of the character of the evidence offered. The clause exacting such proof as a condition precedent merely required the matters mentioned to be shown affirmatively; that is, that the beneficiary make a *prima facie* showing that death had occurred and had resulted as stated. This was done.—*Affirmed.*

LOWDEN SAVINGS BANK, Appellant, v. AUGUST NEITING
and L. H. SNOKE.

Corporations: INDIVIDUAL LIABILITY OF STOCKHOLDERS FOR CORPORATE DEBTS. The individual property of stockholders of a corporation defectively organized, because of an insufficient publication of notice of incorporation, is not liable for indebtedness contracted within three months from the date of the certificate of incorporation, such being the time allowed for publication of the notice: Nor is their property liable for a corporate debt created in renewal of obligations contracted within such time.

Appeal from Cedar District Court.—Hon. M. P. SMITH,
Judge.

WEDNESDAY, JANUARY 13, 1910.

REHEARING DENIED, MONDAY, APRIL 11, 1910.

THIS is an action against defendants as stockholders in the Cedar County Lumber & Manufacturing Company, to recover amounts alleged to be due to the plaintiff from said company on a promissory note and on account of an overdraft. The defendants denied their liability as stockholders, and also denied the existence of the indebtedness from the company to the plaintiff. At the conclusion of the evidence on both sides, the court, on motion of the defendants, directed a verdict in their favor, and from judgment on such verdict the plaintiff appeals.—*Affirmed.*

D. C. McGillivray and Jamison & Smyth, for appellant.

C. W. Kepler & Son and C. O. Boling, for appellees.

McCLAIN, J.—In June, 1902, H. J. Brownell and J. H. Brownell organized in the town of Lowden a joint-stock company, known as the Cedar County Lumber & Manufacturing Company, to engage in the business of manufacturing sash, doors and blinds. The capital stock of the company consisted of \$25,000, a considerable portion of which was subscribed by citizens of the town. The certificate of the Secretary of State authorizing the corporation to do business was issued on June 16, 1902; but, as contended by plaintiff, there was no proper publication of notice, as required in Code, section 1613, and it is claimed that on this account the individual property of the stockholders became liable for the corporate debts. As the publication may be made within three months from the date of the certificate of incorporation (Code, section 1614), the stockholders would not be liable for any indebtedness contracted prior to September 16, 1902. On September 27, 1902, the corporation executed

to plaintiff its promissory note for \$4,500, of which amount, as plaintiff alleged, \$1,825.33, with interest thereon, remained unpaid. Plaintiff also alleged that at the expiration of the three-months period above referred to the corporation was indebted to it for an overdraft on its account to the extent of \$942.90. For the money thus alleged to be due from the corporation to the plaintiff judgment was asked against defendants as stockholders as already indicated.

In the view which we shall take of this case it is unnecessary to determine whether the notice of publication was sufficient. In the case of *Clinton Novelty Iron Works v. Neiting*, 134 Iowa, 311, it was held that this same corporation was not properly organized on account of the defect in publication of notice; but, as there was other evidence in this case than that which was there referred to, that decision is perhaps not conclusive.

In support of the ruling of the court directing a verdict for defendants it is contended for appellee that the note sued on was, to the extent of \$3,055, a renewal of previously existing indebtedness contracted prior to the 16th of September, 1902, as to which there was no liability on the part of defendants, for reasons already indicated, and that the overdraft was subsequently extinguished. If these contentions are sound, we need not consider the other questions fully argued by counsel on each side.

Plaintiff's ledger account with the Cedar County Lumber & Manufacturing Company began on June 5, 1902, with the entry of a deposit of \$3,000, which as plaintiff's cashier testified, represented credit given for a note executed on that date for like amount. It does not definitely appear anywhere in the record who was the payee of this note, but from the statements of the witness that Brownell got credit for his company by giving a note for that amount, and that it "was to the Low-

den Savings Bank," it quite definitely appears that the note was not only delivered to the plaintiff, but that the plaintiff was named as payee therein. It is true that the witness subsequently testified that the plaintiff did not make any such loan, and that on the same date the plaintiff charged the Durant Savings Bank, an institution of which the president of plaintiff bank was also president, with the \$3,000 note received from Brownell, but it is not pretended that the note was sold to the Durant Bank, or that plaintiff acted as agent for the Durant Bank in making the loan, and the only rational explanation of all the evidence on the subject seems to be that for some reason the note was forwarded to the Durant Bank to be held on account of the plaintiff. When the \$4,500 note involved in the present action was executed September 27, 1902, by the Lumber Company to the plaintiff bank, the company was given credit on its ledger account by plaintiff with \$1,445, and the remainder, \$3,055, was included in a credit of \$5,000 given to the Durant Bank. Plaintiff's cashier, as a witness, admits that this credit to the Durant Bank was, to that extent, on account of the \$3,000 note and interest thereon; and if, as we think the evidence already referred to indicates without doubt, the \$3,000 note was simply held for the plaintiff bank by the Durant Bank, then to that extent the \$4,500 note did not represent a new indebtedness, but only a renewal of a previous indebtedness, for which these defendants were not liable as stockholders in the Lumber Company, and for which they were not rendered liable by this renewal. The evidence is to our minds conclusive that when the Lumber Company executed the \$4,500 note, the understanding between it and plaintiff was that it was getting credit to that amount from plaintiff. As against this credit, plaintiff had the right to set off the amount due on the \$3,000 note then mature, provided such note was the property of plaintiff, but it would

not have a right, without the direction of the Lumber Company, to apply a portion of that credit to the extinguishment of a note held by the Durant Bank. Plaintiff's cashier, who transacted the business, does not pretend that any such direction was given, or that plaintiff acted as agent for the Durant Bank in securing payment of the note. As the \$4,500 note was reduced by payments to the amount now claimed, which is much less than \$3,000, it does not appear that the \$4,500 note represents any indebtedness for which the defendants can be held.

As to the claim for overdrafts, it is sufficient to say that, while plaintiff's account against the Lumber Company shows overdrafts to the extent of \$943.86 on September 19th, it also shows that these overdrafts were accumulated prior to September 16th, and that on the 27th of the same month these overdrafts were wiped out by the credit given to the Lumber Company on account of the \$4,500 note, so that, as between the plaintiff and the Lumber Company, the overdrafts for which recovery is claimed were paid and extinguished, and plainly no recovery can be had against defendants on this account. If the \$4,500 note was in fact given for the extinguishment of indebtedness to the plaintiff on account of the \$3,000 note, and the overdrafts now claimed, all of which accrued prior to September 16th, then the plaintiff can not recover against these defendants for the note to the extent to which it has not been subsequently satisfied by payments; for the amount not thus satisfied is much less than the amount of the indebtedness due by the Lumber Company to plaintiff prior to September 16th.

The judgment of the lower court is therefore *affirmed*.

HARRY V. JEFFERIS v. CHICAGO & NORTHWESTERN
RAILWAY COMPANY, Appellant.

Flood waters: INJURY TO GROWING CROPS: MEASURE OF DAMAGES. The measure of damages for injury to growing crops by reason of flooding of the same, in an action by the owner of the land, is the difference between the value of the land with the crops growing thereon prior to the flood, and its value after the flood; but the measure of damages for such injury to crops grown on the land of another is the difference in the reasonable market value of the standing and growing crops, immediately before and immediately after the injury, taking into account the right to mature and harvest the same.

Same: EVIDENCE. In this action the plaintiff is suing for damage to crops grown on his own land and those grown by him on adjoining land. He made no claim of damage to his own land other than to the growing crops thereon, and there was no evidence of any formal lease of the land of the other or of any rental which plaintiff agreed to pay therefor. *Held*, that plaintiff was properly permitted to testify as to the difference in value of the crop raised on such land as it stood before the flood and its value afterwards, taking into account the right to mature and harvest the same so far as not destroyed by the flood, as the measure of his damage.

Same. Where plaintiff is entitled to some damages to growing crops because of flooding the land, it is proper in estimating such damages to determine what the value of the crops would have been in the course of ordinary events if matured; and where the evidence tended to show that the season was favorable to such crops, it was permissible to prove the usual yield and the usual market value in that locality, even though other contingencies might have affected the value of the crops.

Same: FLOOD WATERS: NEGLIGENCE: EVIDENCE. Where the evidence, as in this case, was sufficient to show that a dam composed of drift-wood was formed, and that the damage to plaintiff's crops resulted from the negligent breaking up of the dam by the defendant and a deposit of the flood wood farther down the stream, causing the water to break over the embankment of the stream and flood plaintiff's land, there was sufficient evidence to entitle plaintiff

to recover for injury to his crops; and a refusal of evidence relating to previous and subsequent breaks in the embankment of the stream was not erroneous.

Same. The evidence in this action on the question of whether defendant negligently strung wires across a bridge, at which place flood wood formed a dam, and permitted the same to remain longer than was proper, thus contributing to the formation of the dam, was sufficient to take that question to the jury.

Same. The evidence in this action is also held sufficient to warrant a submission to the jury of the question whether defendant's employees were negligent in breaking up the original dam, causing the flood wood to pass farther down the stream, there forming a dam and flooding plaintiff's crops.

Same: INSTRUCTION. The evidence in this case tending to show that the original dam in question was caused or contributed to by wires strung on defendant's fence, that the dam was in part on defendant's land and that it caused the water to flow along its right of way and imperil its track, was sufficient to authorize a submission of the question of defendant's duty to remove the wires.

Same: NEGLIGENT ACTS OF AGENT: LIABILITY OF PRINCIPAL. Where, as in this case, the evidence is sufficient to warrant the conclusion that defendant's employees were acting in its interest in removing the dam or obstruction to the waterway in question, their acts in so doing, if performed in good faith, are binding upon the defendant.

Same: NEGLIGENCE: PROXIMATE CAUSE: EVIDENCE. The evidence in this action is held sufficient to show that there was reason to believe, on the part of defendant's employees, that the flood wood flowing down the stream after the dam in question was broken up would lodge further down the stream and obstruct the flow of water, and cause the bank of the stream to break with resulting injury to plaintiff's crops; and that on the whole case there is sufficient evidence of negligence and that the breaking of the embankment was the proximate result thereof to take the case to the jury.

Appeal from Pottawatamie District Court.—Hon. A. B. THORNELL, Judge.

FRIDAY, JANUARY 14, 1910.

REHEARING DENIED, MONDAY, APRIL 11, 1910.

ACTION to recover damages to plaintiff's crops by water thrown upon plaintiff's land as the result of negligence on the part of defendant's employees in causing an obstruction of a stream. There was a verdict for plaintiff, and defendant appeals.—*Affirmed.*

Harl & Tinley, James C. Davis, George E. Hise, and A. A. McLaughlin, for appellant.

John P. Organ, for appellee.

McCLAIN, J.—During the year of 1906 plaintiff was farming about one hundred acres of land belonging in part to himself and in part to his wife, lying about half a mile west of the right of way of the defendant road in Pottawattamie county. Through a bridge on this right of way Honey Creek flows from the east, where it rises in the hills, and after passing under what is known as Frazier's Bridge, a wagon bridge at the edge of the right of way, it flows farther west for a little distance, and then makes a sharp turn to the south through bottom land. After passing under the Frazier bridge, the stream is very shallow in the ordinary stage of water, the bottom of its bed not lower than the land to the west, its western bank being a levee or embankment, whether natural or artificial does not appear, which alone restrains the water from leaving the channel and flowing on the adjacent land. On March 26, 1906, a gorge of ice, logs, brush, and debris formed at the Frazier bridge following a sudden rise of the stream, and the employees of defendant broke it up, causing the material composing it to be carried around the bend above referred to, where, as plaintiff alleges, the logs, brush, and debris lodged in the shallow channel of the stream as the water subsided, causing such an obstruction of the channel

that in the following June, when the water was again high, it broke over the levee or bank on the west side of the stream, flowing thereafter in a westerly course to plaintiff's land, causing the damage of which plaintiff complains. This damage resulted from the flooding of the greater part of his farm, which consisted of corn land, hay land, and pasture, destroying a large portion of the growing crops of corn and hay on said land. The jury returned a verdict for damages in the sum of \$850, and judgment was rendered for plaintiff in this amount.

I. Over defendant's objection, plaintiff was allowed to testify as to the reasonable value of the corn crop and hay crop respectively growing on the flooded land before

i. FLOOD WA-
TERS: injury
to growing
crops:
measure of
damages.

and after it was damaged by being flooded, taking into account the right of the plaintiff to go upon the land and do everything necessary to mature the crop and market it, had it not been destroyed by the flood. The court subsequently instructed the jury that, as to the crops growing on land, title to which was in plaintiff, the measure of damages was the difference between the value of the land with the crops growing thereon prior to the flood and its value after the flood, while, as to the crops growing on land belonging to plaintiff's wife, the measure was the difference in the reasonable market value of the crops standing and growing on said land immediately before and immediately after the injury occasioned by the flood, taking into account the right of plaintiff or a purchaser of the growing crop to mature and harvest said crop on said land. Counsel for appellant concedes the correctness of this instruction as to the crops growing on plaintiff's land; this being the rule recognized in previous decisions of this court. *Drake v. Chicago, R. I. & P. R. Co.*, 63 Iowa, 302; *Sullens v. Chicago, R. I. & P. R. Co.*, 74 Iowa, 659; *Harvey v. Mason City & Ft. D. R. Co.*, 129 Iowa, 465; *Blunck v. Chicago & N. W. R. Co.*, 142 Iowa, 146.

But he contends that under this rule the objections to the question propounded to plaintiff as a witness above referred to should have been sustained, and that the same <sup>2. SAME:
evidence.</sup> rule should have been applied with reference to crops growing on land belonging to plaintiff's wife; that is to say, that as to such crops the correct measure of damage would be the difference in value of the leasehold interest before and after the injury. In discussing these questions it must be understood that plaintiff made no complaint of damage to his land other than to the immature crops standing thereon, and that there was no evidence of any formal lease to plaintiff from his wife of the land owned by her, or of any rental which plaintiff had agreed to pay for the use of such land.

Under these circumstances, we do not think that it was error to allow plaintiff to testify as to the value of the immature crops destroyed, that is, as to the difference in value between the crops as they stood before the flooding of the land and their value afterwards, taking into account the right of plaintiff to mature and harvest them on the land, so far as they were not destroyed. It is true that in the *Drake* case, *supra*, it was held that it was error to allow a witness to testify that the crop which was immature when destroyed by the flood would have been worth a certain amount per acre; the answer being based on the number of bushels per acre which would have been realized had the crop not been destroyed. But the court conceded that the value of the premises covered by the immature crop should be estimated with reference to such crop as it was at the time of the injury. And in the *Harvey* case it is said: "Of course, in determining the value of the land before and after the injury the value and condition of the crops, if any, and the extent to which they are injured or destroyed, are material matters for the consideration of the jury." We think it was not error, therefore, to allow plaintiff to testify as to the value of the immature crop

before and after the flood as bearing upon the difference in value of the land preceding and following such injury.

It may be that, if plaintiff had been a tenant under a lease for a specified period of time, the court might consistently have directed the jury to determine the value of his leasehold interest in his wife's land before and after the injury; but, as it does not appear he had any right in the land save that he was lawfully raising crops thereon, we can not well see what other measure of damage could have been adopted with reference to such land than the difference in value of the immature crops growing upon the land before and after the injury occurred. The value of his right before the injury was the value of the immature crops, and the value of his right after the injury was nothing more than the value of the immature crops as they were after the injury was inflicted. We can not see that there was any error prejudicial to appellant in receiving the testimony of plaintiff which was objected to, or in the instruction as given with reference to the measure of damages for crops destroyed on his wife's land. As suggested in *Blunck v. Chicago & N. W. R. Co., supra*, it is obvious that where crops are growing on leased land the value of the crop destroyed is the basis of the recoverable damage.

II. In view of the testimony tending to show that the season was favorable to the raising of a corn crop, we think there was no error in permitting plaintiff to testify to the usual yield of corn per acre on such land
^{3.. SAME} which he was farming, and the usual market value of corn per bushel in that locality. These elements of value were properly taken into account in estimating the value, at the time of the flood, of the corn crop growing on the land. It is true that there might be contingencies other than the flood which would affect the value of the crop; but, if plaintiff was entitled to some damage, in estimating that damage the best that could be done was to

determine what the value of the crop would have been in the course of ordinary events, had the flood not occurred. As said in *Blunck v. Chicago & N. W. R. Co., supra*: "It was not necessary, nor would it have been proper, to have gone into the question of the possible chances of the losses or injury incident" to the maturing and harvesting of the crop. "This is a world of chances; but the law does not take into consideration, in estimating damages for an injury actually inflicted, the possible chances that, had such injury not occurred, the like or some other misfortune to the subject might have arisen out of some other and independent operating cause. Rather the law of damages as here related deals in presumptions, and the courts will assume that in due and ordinary course a growing crop will mature and be harvested without loss, just as they will assume that the ordinary man will live to fill the period of his expectancy."

III. Several errors are assigned relating to the action of the court in refusing to allow defendant to show previous and subsequent breaks in the levee or embankment which

held the creek within its channel. This evidence might have had a tendency to show that other causes than the deposit of the material washed down the stream when the gorge was broken up by defendant's employees had caused or would cause a similar break in the levee or bank, and might have produced the damage to the plaintiff; but if it appeared to the jury from the evidence that the particular break complained of, resulting in the flooding of plaintiff's land, would not have occurred had the defendant's employees not caused the material forming the gorge to be deposited lower down in the channel of the stream so as to constitute a dam, then we think it was wholly immaterial what breaks might have occurred from other causes. The evidence tended to show that such a dam was in fact formed, and that the break complained of resulted therefrom, and to

4. FLOOD WATERS:
negligence:
evidence.

entitle plaintiff to recover damages it was only necessary for him, as we think, to establish the fact that this result followed the negligent acts of defendant's employees, if those acts were within the scope of their authority as hereafter indicated.

IV. One of the grounds of negligence alleged was that defendant's employees had during the preceding winter stretched wires across the east end of the Frazier Bridge

^{S. SAME.} forming a part of the fence along the west line of defendant's right of way, and that

these wires had been negligently allowed to remain longer than proper and until the breaking up of the stream in the spring, when they intercepted the drift and debris during the time of high water and caused or contributed to the formation of the gorge already referred to. On this subject the jury was instructed that the question whether the wires were across the end of the bridge at the time the gorge was formed and brought about the formation of the gorge was material only as it might affect the duty of the defendant as to removing said gorge. But the action of the court in submitting to the jury any question relating to the wires across the end of the Frazier Bridge is complained of because, as it is claimed, there was no evidence whatever that such wires remained there until the formation of the gorge. A witness for the defendant testified that the wires had been cut several days before the gorge commenced to form. Plaintiff and another witness testified on direct examination that these wires were there the night before the gorge first appeared, and, while their testimony was somewhat weakened on cross-examination, we think its value as evidence rebutting the statements of defendant's witness was not wholly destroyed. For instance, plaintiff testified on cross-examination that he did not know whether the wires were cut before the stream came up or not, and that so far as he knew they might have been cut before the stream did come up; but this statement may have re-

ferred to the night before the formation of the gorge and did not directly overcome his positive statement on direct examination that he saw the wires in place the night before the gorge was formed, for he admitted in his direct examination that the wires might have been cut during the night, and only testifies that during the night they had been broken or cut. Although the other witness for plaintiff on this subject was somewhat ambiguous on cross-examination as to whether he did in fact see the wires across the end of the bridge the day before the gorge was formed, he testifies positively that a post on which the wires had been strung was still there, although it had disappeared the next morning, and we think the court did not err in refusing to strike out his testimony on the subject.

V. The insufficiency of the evidence to show negligence on the part of defendant's employees in causing the material forming the gorge to flow down the stream when the flood was abating and be deposited in the

^{6. SAME.} shallow part of the stream so as to form a dam, causing the subsequent break in the embankment of which plaintiff complained, is vigorously insisted upon by counsel for appellant as a ground for reversal. But we think the question was properly one for the jury. If we are to concede that the employees were acting within the scope of their duty to the defendant or to the public in breaking up this gorge, then it was their duty to proceed in such manner as would not be likely to result in subsequent injury to plaintiff or other neighboring landowners. If a reasonably prudent person could have foreseen that the logs and debris liberated from the gorge would accumulate in another gorge or dam lower down the stream so as to impair the safety from subsequent floods of adjoining or neighboring land which might be flooded, should the embankment break as the result of the formation of this new dam, then the employees were bound to use reasonable care to see to it that the logs and debris thus liberated did not

accumulate below to form such obstruction, and this whole question must have been for the jury to determine. If, in this respect, the jury was properly instructed, we do not see how we can interfere with its finding on the questions of negligence and proximate cause.

VI. Those who acted in breaking up the gorge at Frazier's Bridge were employees of the defendant working under the direction of defendant's section foreman. The 7. ^{SAME:} court instructed the jury that, if the wires instruction. which had been stretched across the end of the Frazier Bridge as a part of defendant's right of way fence were instrumental in causing the gorge to form there, then it would be the duty of the defendant company to remove such gorge or obstruction from the waterway, but that, if the gorge in question was formed naturally in the stream, it would not be within the scope of employment of defendant's employees to remove it, unless some portion thereof was on the defendant's right of way, or unless the gorge by backing the water and turning the stream to the eastward of defendant's track was threatening the safety of such track. As already indicated, there was some evidence tending to show that the gorge was caused or contributed to by the wires of the fence which had not been cut or removed, and there was other evidence that the gorge was in part on defendant's right of way, and that it caused the water to back up on the east side of the bridge and flow down on the east side of the track so as to imperil its safety. The sufficiency of the evidence in these respects to sustain a verdict is questioned, but we can not set it out in detail. It is sufficient to say that in our judgment it supported the instructions of the court and justified the submission to the jury of the questions left to them for determination.

In the light of the evidence, it can not be seriously disputed that the defendant's employees were acting in its interest, and not in their own interest or on their own be-

half, in breaking up the gorge. If they were acting for defendant in good faith, believing that the circumstances were such as to require action on their part in defendant's interest, then their negligence would be chargeable to defendant. Some discretion was necessarily left to the section foreman in determining what should be done to protect defendant's right of way and track, and to relieve defendant from liability for damages which might result to adjoining property owners from the formation of a gorge on defendant's right of way or caused by the wires of its fence. *Scott v. St. Louis, K. & N. W. R. Co.*, 112 Iowa, 54; *Baxter v. Chicago, R. I. & P. R. Co.*, 87 Iowa, 488; *Barmore v. Vicksburg, S. & P. R. Co.*, 85 Miss. 426 (38 South. 210, 70 L. R. A. 627); *Mobile & O. R. Co. v. Stinson*, 74 Miss. 453 (21 South. 14, -522). It is not pretended that these employees had consciously departed from their employment, and were acting in their own interest or for their own purposes, and the cases of *Golden v. Newbrand*, 52 Iowa, 59; *Marion v. Chicago, R. I. & P. R. Co.*, 59 Iowa, 428, and *Dolan v. Hubinger*, 109 Iowa, 408, are not in point. In *Healy v. Patterson*, 123 Iowa, 73, the servant for whose negligent act the defendant was sought to be charged was one having no duty whatever with reference to the machinery which he attempted to use, so that the employee was a mere volunteer in attempting to manage the machinery. In the case before us, defendant's employees were not volunteers, but they were the persons employed to look after the safety of defendant's track, and to prevent any damage to adjoining property owners from improper obstructions in the stream upon its right of way or caused by its fence. They were not acting, therefore, beyond the scope of their employment, if there was any evidence to sustain the findings of fact which the jury might have made in response to the instructions given by the court on the subject. As we find there was such

8. SAME:
negligent
acts of agent:
liability of
principal.

evidence, we reach the conclusion that there was no error either in the giving of the instructions on the subject or in refusing to set aside the verdict of the jury for lack of evidence in this respect.

VII. The most serious questions in this case are as to whether the employees of defendant had reason to believe that the logs and debris flowing down the stream when the

gorge was broken up by them would lodge farther down so as to obstruct the stream and cause the water of this or a subsequent flood

to break through the embankment of the stream, and whether the break that subsequently resulted, involving damage to plaintiff, was the proximate result of their act. These questions have already been referred to, but some further reference to the evidence should be made. The bed of the stream below the bend was shallow, and there was but slight fall, so that in the nature of things the current would be less swift and powerful than that which had brought this material from the hills to the east of the track against and under the railroad bridge. A reasonable man, we think, could have anticipated that without some assistance from the employees in keeping it in the channel it would probably be deposited in such way as to form a further obstruction. According to the testimony of some of the witnesses for plaintiff, defendant's section foreman seems to have realized this danger and been indifferent to it. According to this testimony, his object was to get the gorge loosened up and the material composing it around the bend out of sight from the railroad track. Defendant's employees used pike poles in loosening the logs out of the gorge, and the jury may well have believed that, had they used reasonable care, these employees could have kept the logs afloat to a lower point in the stream where there would have been less danger of causing an overflow from a subsequent flood, or could have taken them out of the stream and avoided such danger. Had these larger

9. SAME:
negligence:
proximate
cause:
evidence.

obstacles not been allowed to lodge in the stream, the brush and rubbish might reasonably have been expected to be washed away without further damage.

Many photographs have been presented as a part of defendant's evidence, relied on as showing conclusively that the bed of the stream below where the break occurred was in its natural condition full of logs and rubbish, so that the damming back of the water in the subsequent flood could not properly be attributed to the presence of the logs and rubbish coming down from the gorge. But some of the witnesses identified particular logs subsequently found below the break in the embankment in June as having formed part of the gorge which was broken up by defendant's employees in March, and we can not say as a matter of law that there is no evidence to support a finding that the negligence of defendant's employees in not seeing that these logs were carried further down the stream or were removed from it did not contribute in an important degree to the formation of the obstruction in the bed of the stream which caused the break in the embankment in June resulting in the injury to plaintiff's land. We think there was sufficient evidence of negligence, and of the break in the embankment as the proximate result thereof, to carry the case to the jury.

VIII. The verdict is complained of as excessive; but, in view of the evidence as to the value of the crops destroyed, we can not say that it is unreasonable. Plaintiff lost almost the entire product of nearly a hundred acres of land which was either planted in corn or appropriated to the raising of a crop of hay, and, if defendant was liable at all, the plaintiff was entitled to very substantial damages for this loss. We see no basis on which we could reduce the amount of the verdict.

Finding no prejudicial error in the record, the judgment is *affirmed*.

W. G. Cox v. AMERICAN EXPRESS COMPANY, Appellant.

Carriers: SHIPMENT OF PROPERTY BY EXPRESS: ORAL CONTRACT: EVIDENCE. In this action against the defendant express company by the consignee of a horse shipped under an alleged oral agreement with plaintiff, the fact that the party delivering the animal to the express company signed a contract for its transportation did not prevent plaintiff from proving his oral contract, in the absence of any proof that the party delivering the animal to the company was acting as his agent; the two contracts being entirely distinct and between different parties. The evidence in this case is held sufficient to take the question of an oral contract of transportation to the jury.

Same. Where an express company has contracted to transport property under an oral contract with the consignee, it will not be relieved of the duty of performing such agreement by the fact that it induced the party delivering the property to the company to sign a written contract of transportation, it not being shown that such party acted as the agent of the consignee.

Same: NEGLIGENCE: EVIDENCE. The evidence in this action is held sufficient to take the question of defendant's negligent care of the property while in transit to the jury.

Appeal: MOTION FOR A NEW TRIAL: SCOPE OF REVIEW. Where an appeal is not taken within six months from the rendition of judgment, but within six months from the overruling of the motion for a new trial, only those questions involved in the ruling upon the motion will be reviewed.

Gifts: TRANSFER OF TITLE. Although a gift of property might not have been consummated prior to a delivery of the same to an express company for transportation to the consignee, under a contract made with him for shipment, the fact of such delivery for shipment operated to transfer the title.

Appeal from Dubuque District Court.—Hon. ROBERT BRONSON, Judge.

SATURDAY, JANUARY 15, 1910.

REHEARING DENIED, MONDAY, APRIL 11, 1910.

ACTION for value of a thoroughbred saddle mare lost while being transported resulted in a judgment against defendant from which it appeals.—*Affirmed.*

Lyon & Lyon, for appellant.

J. P. Frantzen, and T. J. Fitzpatrick, for appellee.

LADD, J.—The plaintiff's daughter, Mrs. Campbell, had given him a thoroughbred mare at Utica, N. Y., and, as he was unable to make satisfactory arrangements with a freight line for transportation thereof to Dubuque, the agent of defendant at the latter place suggested that he have it shipped by the American Express Company. Negotiations resulted in defendant receiving her September 19, 1906, and she reached Chicago shortly after three o'clock on the following afternoon, too late for the outgoing train to Dubuque. The company unloaded and left her in its building near the depot until seven forty o'clock in the evening, when an employee undertook to lead her to its barns, several blocks distant. She was nervous and became frightened by automobiles and street cars, and finally, according to the employee's story, reared on the hind legs, and fell over backward on the pavement, and died. The plaintiff's claim for the value of the animal at Dubuque, less transportation charges, is based on an alleged oral agreement with defendant's agent at that place, while defendant contends that transportation was undertaken in pursuance of a written contract with plaintiff's daughter at Utica, N. Y., in which the value of the animal was limited to \$75. The court instructed that, in order to warrant a verdict for the plaintiff, the jury must find that there was an oral agreement such as alleged, that the shipment was undertaken thereunder, and that

the death of the animal was due to defendant's negligence. This was tantamount to saying no recovery could be had under the alleged written contract with the daughter, and the jury was expressly so informed.

The sufficiency of the evidence to support the verdict is challenged. The agent at Utica testified that Mrs. Campbell called and said she would like to ship a horse to

1. CARRIERS:
shipment of
property by
express: oral
contract:
evidence.

her father at Dubuque, and that he explained to her that she would have to come in when it was brought to the office, and sign

a release, and that, if the value was above

\$75, the charges would be increased; that the animal was brought in some days later when Mrs. Campbell signed the contract, and was given a duplicate, that he again explained the limitation in value and its effect on the cost of transportation; that she did not want to pay the charges and did not read the contract. On the other hand, Mrs. Campbell testified that there was nothing said by the agent or herself concerning the value of the animal; that she informed him she had nothing to do with the shipment of the horse; that her father had made all arrangements at Dubuque for the transportation; that he then handed her the contract with directions to "sign this," which she did without reading or explanation, and did not receive a duplicate; that, when she first called, she handed the agent a letter purporting to have been written by the agent at Dubuque to one Storrs, a general agent of defendant, in which the agent requested that the animal be sent by the most direct route, saying that plaintiff had been a good patron of the company, and that plaintiff had arranged with him to have it shipped at a cost of \$105; that the agent at Utica, after reading this letter, said he would look up the trains, and ascertain when the animal could be sent by the most direct route. Both agents deny this; the one at Dubuque having written it and the one at Utica having been shown such a letter. But both admit that the

Dubuque agent wrote a letter to the Utica agent concerning the transportation and the Utica agent that she exhibited a letter from her father, and that she might have said her father had arranged at Dubuque for the shipment of the horse.

The jury might have accepted Mrs. Campbell's testimony; and, if so, the company was advised that she had nothing to do with the transportation save to deliver the animal to the express company, and merely signed the contract because requested, and not for any purpose of her own. There is no pretense that in putting her name to the paper she was acting for plaintiff. This instrument, then, though in writing, furnished no obstacle to the introduction of oral evidence of an agreement between the plaintiff and the agent at Dubuque, for the reason, among others, that it was between the same parties. This evidence, when considered in connection with that hereafter referred to, was sufficient to authorize a finding that the transportation of the mare was undertaken in pursuance of the arrangements between the Dubuque agent and plaintiff. The latter testified that, after talking to the agent of a freight line, he had a conversation with this agent of defendant, who informed him that the charge for transporting the mare from Utica, N. Y., would be \$105; that she would be placed in the express car with a portable stall and come through in the same time as a passenger, and, upon reaching Chicago, would be transferred by means of a platform; that the agent exhibited to him a couple of contracts for the carriage of race horses, but he did not read all of them; that he noticed the clause limiting the value of a horse to \$75 and directed the agent's attention thereto; that the agent explained that this was a mere matter of form, and that, should the animal be killed, he would be paid the reasonable value thereof, and that he (Cox) told the agent that, if what he said was true, to go ahead and ship the mare, and that he then wrote his daughter

to deliver the mare to the express company at Utica, N. Y. The plaintiff was under the impression that the agent told him that a contract must be signed, and that he signed one. The agent testified that no contract was signed; that he told Cox his daughter would have to make the contract; that he had no authority to do so, and he denied having said anything concerning paying the reasonable value of the mare, though Cox noticed the limitation of the blank form of contracts shown him and talked of it and read the form through. The plaintiff denied that anything was said concerning his daughter signing the contract. It is manifest from this recital that whether there was an oral arrangement entered into for the carriage of this mare was for the jury. See *Stoner v. Railway*, 109 Iowa, 551.

The plaintiff was having the animal transported as both agents knew, and, if the arrangement was made and defendant undertook to carry the animal thereunder,
2. SAME. the circumstance that the company induced another not contemplated in the oral agreement to sign a contract in no way relieved it from the duty of performing its oral undertaking.

Nor can it be said that defendant was without fault in taking this animal from its building near the depot on the main thoroughfares of a great city after
3. SAME:
negligence:
evidence. nightfall in order to lead her to its barn.

She was nervous and excitable, frightened by glaring light of automobiles, and by passing street cars, as the employee knew and the jury might well have found that ordinary prudence required that she should have been returned to the building rather than continued in the streets on the way to the barn. We are of opinion that the case was one for the jury.

II. The appeal was taken more than six months after judgment, but less than that time after the order overruling the motion for new trial. This being so, the order

only is subject to review, but this involves all questions raised by the motion for new trial, regardless of whether ruled on previously or not. *Mueller Lumber Co. v. McCaffrey*, 141 Iowa, 730.

4. **APPEAL:** motion for a new trial; scope of review.
s. **Gifts:** transfer of title.

III. The finding that there was sufficient evidence to carry the issues raised in the petition to the jury disposes of most of the errors assigned. Several rulings on the admissibility of evidence are assailed, but, were they conceded to have been erroneous, prejudice therefrom was impossible. Even if Mrs. Campbell had not consummated the gift of the mare to her father previously, the delivery to the express company at his direction, and to be shipped by it in pursuance of arrangements made with him accomplished this and effected the transfer of title to him.

No other ruling requires consideration save to approve, and the judgment is *affirmed*.

JAMES CONSTANTINE v. EVAN ROWLAND, LAGOMARCIANO
GRUPE COMPANY, and THE UNITED STATES FIDELITY
& GUARANTY COMPANY, Appellants.

Dismissal of action as to nonresident defendant. Where an action is against several defendants, some of whom are nonresidents of the county, and the action is dismissed as to the resident defendants, such nonresidents may have the cause dismissed as to them; but before they are entitled to a dismissal they must establish the fact of nonresidence.

Evidence: JUDICIAL NOTICE: PLEADINGS. There may be causes of action so closely interwoven or so clearly interdependent that in the trial of one the court will take judicial notice of averments contained in the pleadings of the other action; but where the actions are entirely separate and independent the rule does not obtain: Thus in an action by a claimant of attached property on an indemnifying bond, the court will not take judicial notice of statements contained in the petition in the attachment suit.

Misjoinder of parties: WAIVER OF OBJECTION. An original misjoinder of parties defendant is immaterial where, after amendment bringing in proper parties, all of such defendants voluntarily answer.

**Attachment: EXEMPLARY DAMAGES: LIABILITY THEREFOR ON INDEM-
NIFYING BOND.** The statutes require an officer to levy under a writ of attachment upon any personal property which the plaintiff points out and directs him to levy upon, and to proceed to subject the property upon the giving of an indemnifying bond by the plaintiff, and any liability of the officer for exemplary damages in so doing must arise from his acts outside the line of his duty as an officer, and the attaching plaintiff is not liable therefor on the indemnifying bond unless he is a party to such acts.

Same. A claimant of property held under an attachment can only recover of the officer actual damages for a wrongful levy, and he has no greater right in an action upon an indemnifying bond.

Same. It is the general rule that where the claimant of attached property elects to recover damages on an indemnifying bond he is only entitled to such damages as are compensatory, both as against the principal and sureties, unless it is otherwise provided in the bond.

Same: RECOVERY OF ATTORNEY FEES. The right to recover attorney fees is purely statutory, and as the statute providing for damages on an indemnifying bond in an attachment suit does not authorize a recovery of such fees, the claimant of the property can not recover in an action on the bond for fees incurred in intervening in the attachment suit and securing a release of the property.

*Appeal from Johnson District Court.—Hon. R. P.
Howell, Judge.*

TUESDAY, JANUARY 18, 1910.

REHEARING DENIED, MONDAY, APRIL 11, 1910.

ACTION on an indemnifying bond for damages for the wrongful levy of an attachment. Trial and judgment for the plaintiff. The defendant appeals.—*Reversed.*

Wade, Dutcher & Davis, for appellants.

W. J. Baldwin and A. E. Maine, for appellee.

SHERWIN, J.—The plaintiff in this action became the owner of a certain stock of goods consisting of fruit, confectionery, etc., by purchase from one Albert Gramas. At the time of the sale and transfer of said stock to the plaintiff, Gramas was indebted to the Lagomarcino Grupe Company and to several other dealers in his line. After the plaintiff had been in possession of the stock so purchased for some time, the defendant Lagomarcino Grupe Company brought suit against Gramas on their own claim, and on others that had been assigned to them, and sued out a writ of attachment, which was levied on the stock in possession of the plaintiff, Constantine. Constantine served notice of his ownership of the stock on the sheriff, Evan Rowland, one of the defendants herein, and thereupon the sheriff demanded and received from Lagomarcino Grupe Company an indemnifying bond. A day or two after the indemnifying bond had been furnished, the plaintiff herein, Constantine, executed a delivery bond, and the stock was thereupon surrendered to him. The levy deprived him of possession only about three days. Thereafter Constantine intervened in the original attachment suit, claiming that he was the owner of the attached property. Trial was had on the issues joined, and it was determined in favor of Constantine, and the levy was discharged. Soon after that action had been disposed of, Constantine brought suit against the present defendants on the indemnifying bond. Still later he filed a substituted petition making the sheriff, Rowland, and the Lagomarcino Grupe Company defendants, and asking judgment against them for damages for trespass. The said defendants answered, and the case went to trial. At the close of the plaintiff's evidence defendants moved for a directed verdict on the ground of misjoinder of causes of action and of parties. The motion was sustained as to the defendant Rowland, and the action was dis-

missed as to him. After this ruling had been made, the plaintiff asked leave to amend and sue on the indemnifying bond, with the sureties thereon as parties defendant. Plaintiff was permitted to so amend and sue, and he immediately filed an amendment to his substituted petition declaring on the said bond. The Lagomarcino Grupe Company then moved to strike the amendment and to dismiss for the reason that it presented an entirely new cause of action, and for the further reason that the Grupe Company was a nonresident of Johnson County, and the court had no jurisdiction of said company. The motion also asked that in the event of its being overruled the case be continued. The case was continued, but no ruling was made on the motion to strike and dismiss. Thereafter all of the defendants answered, and the case was tried, resulting in a judgment of \$1,125 for the plaintiff.

The first proposition argued by the appellants is that the court was in error in not dismissing as to the Lagomarcino Grupe Company upon motion, after there had been a

i. **DISMISSAL OF ACTION AS TO NON-RESIDENT DEFENDANT.** dismissal as to the sheriff, Rowland. Section 3502 of the Code provides that, where an action is against several defendants, some of whom are residents and others nonresidents of the county, and the action is dismissed as to the residents, such nonresidents may, upon motion, have said cause dismissed. This provision of the statute is plain enough; and, where the condition therein stated exists, there can be no question as to the right of the nonresident defendant to have the suit against him dismissed. But before he can insist upon such a dismissal, he must show to the court that he is a nonresident defendant. There was no showing of the kind made in this case.

It is true, in the attachment suit, that Lagomarcino Grupe Company alleged that it was a corporation resident of Linn County, and the appellants say that the trial court should have taken judicial notice of the pleadings in that

case. There may be cases so closely interwoven, or so clearly interdependent, as to invoke such a rule. But this is not one of that class of cases. The present suit was wholly independent of the attachment suit so far as the pleadings were concerned. It was conceded in this case that the levy had been made and the stock taken thereunder. There was no issue between the Lagomarcino Grupe Company and Gramas, the defendant in their action, and this plaintiff was not concerned about the pleadings in that case, nor could he be in any way bound or affected thereby. The cases were therefore entirely separate and distinct, and the trial judge in this case could not take judicial notice of a statement made in the petition in the attachment suit. 16 Cyc. 918 (c) & (d).

3. **MISJOINDER OF PARTIES:** waiver of objection.

An original misjoinder of parties defendant is of no moment now, because after the amendment instituting the present action, all defendants voluntarily answered.

4. **ATTACHMENT:** exemplary damages; liability therefor on indemnifying bond.

The court instructed that the plaintiff would be entitled to exemplary damages if it was found that the levy was made willfully, maliciously, and without reasonable grounds for believing that the goods levied upon were the property of Albert Gramas, or, if it was found that the holding of said goods after the levy was willful and malicious.

The actual damage proven was small, and the verdict shows beyond question that a large sum was allowed as exemplary damages. The appellants contend that such damages may not be recovered in a suit on an indemnifying bond, given to the sheriff or other officer who makes the levy, in accordance with the provisions of sections 3991 and 3992 of the Code. Section 3991 makes it the duty of an officer to levy on any personal property on which the plaintiff directs him to levy, unless he has received notice in writing that such property belongs to

some other person. It further says: "Or, if after the levy he receives such notice, such officer may release the property unless a bond is given as provided in the next section; but the officer shall be protected from all liability by reason of such levy until he receives such written notice." Section 3992 provides that, after the officer has received the notice referred to in the preceding section, he may require an indemnifying bond from the plaintiff, and that such bond may be given to the effect that the obligors will indemnify the officer against "the damages which he may sustain in consequence of the seizure or sale of the property, and will pay to any claimant thereof the damages he may sustain in consequence of the seizure or sale. . . . and thereupon the officer shall proceed to subject the property to the execution, and shall return the indemnifying bond to the court from which the execution issued."

It will be noticed that the bond provided for is to be conditioned to indemnify the officer, or claimant of the property, against the damages which he may sustain in consequence of the seizure or sale. The primary object of the statute is to compel the officer to levy on property that is pointed out to him by the attaching plaintiff, and to protect him from liability for so doing. *Cousins v. P & G. Co.*, 122 Iowa, 465; *Cheadle & Zangs v. Guittar*, 68 Iowa, 680. And, the officer being compelled to make a levy and to hold the property when a bond has been given, it is self-evident that he can not be made liable for exemplary damages for such acts alone. If such damages may be recovered from him at all, they must arise from some act outside of the line of his duty as an officer, and for such act the attaching plaintiff would not be liable unless he was in some way a party to it. 13 Cyc. 114.

If the officer who makes the levy or holds the property under the positive requirements of sections 3991 and 3992 can not be held liable for exemplary damages, it must

logically follow that section 3992 does not provide for or authorize a recovery on the bond for anything more than the actual damages which have been suffered in consequence of the levy, and hence when full compensation is made therefor, there is no further liability on the bond. It is also manifest that a claimant of the property can have no greater rights under the statute in question than the officer. It being one of the primary objects of the statute to protect the officer against the actual damage sustained by him, we think it must follow that no broader protection is given to the claimant of the property. Exemplary damages are not compensatory in the ordinary sense. Such damages are usually given as a punishment to the offender, for the benefit of the public, and to prevent similar acts. It is a general rule also that exemplary damages are not recoverable on an indemnifying bond unless expressly so provided by the bond or by statute. 13 Cyc. 116.

If the claimant of attached property elects to bring a suit to recover damages on a bond of indemnity given to the officer, he can only recover the damages provided for in the bond and statute authorizing it. And 6. SAME. such damages are generally compensatory only as to the principal, as well as to the sureties. *North v. Johnson*, 58 Minn. 242 (59 N. W. 1012); *McClendon v. Wells*, 20 S. C. 514; *Spaids v. Barrett*, 57 Ill. 289 (11 Am. Rep. 10); *Dalby v. Campbell*, 26 Ill. App. 502. The construction which we think should be given the statute under consideration is strengthened by the provisions of sections 3885 and 3887 of the Code, which provide for a bond in attachment cases and designate the elements of damage that may be recovered thereon; the latter section expressly providing that exemplary damages are recoverable when malice in suing out the writ is shown. Applying the test of exclusion, it would seem to leave little doubt as to the limitation imposed by section 3992. Fur-

thermore, there is no evidence in the record which would justify a finding that the officer acted maliciously, or that he in any way exceeded the duty imposed upon him by the law. We hold, therefore, that the court was in error in permitting the recovery of exemplary damages.

The plaintiff intervened in the attachment suit, and secured a release of the property. In this action on the indemnifying bond he claimed and was allowed the attorney's fees charged him in the intervention proceedings. He was not entitled thereto.

^{7. SAME: recov-}

^{ery of attor-}

^{ney fees.}

In actions on the attachment bond attorney's fees may be recovered under certain conditions, because the statute (Code, section 3887) expressly so provides. Except for the authority given by such statute, no recovery of attorney's fees could be had. *Vorse v. Phillips*, 37 Iowa, 428. The present action is on an indemnifying bond which bears no relation to an attachment bond. In actions of this kind no attorney's fee is directly authorized by the statute to either the officer making the levy under the direction of the attaching creditor, or to the claimant of the property. In *Cousins v. Paxton & G. Co.*, 122 Iowa, 465, we held that the officer might recover such fees in a suit on his indemnifying bond, because he was compelled to make the levy if directed so to do by the plaintiff, and the bond was furnished to him for the purpose of affording him full indemnity; that he had no personal interest in litigating the ownership of the property levied upon, and no interest in such litigation, except to protect himself and his bondsmen where he had performed the duty required of him by the statute. The officer being compelled to make a levy, and thereafter to hold the property when an indemnifying bond is furnished, he can not be fully indemnified unless he be permitted to recover the money paid out by him in defending such levy. Code, section 3992, says, in effect, that the bond shall be given to indemnify the officer. But the provision in the

same section relating to the claimant of the property is not in the same language. It provides only that the bond shall be conditioned to pay the claimant of the property the damages which he may sustain. This language is substantially the same as that used in section 3885 of the Code, which provides for a bond in attachment suits, and it has been the holding that no attorney's fees could be allowed on such bonds in the absence of a statute expressly authorizing it. We think it was the intention of section 3992 to give the claimant of the property no greater rights thereunder than are given by section 3885. All of the claimant's acts are voluntary. He may or may not attack the levy and contest the ownership of the property. If he does attack it, it is for his private interest, and there is no more reason why he should be paid attorney's fees in the absence of a statute so directing than that any other litigant should be permitted to recover his expense of that kind. We hold, therefore, that the claimant of property is not entitled to recover attorney's fees on an indemnifying bond given under section 3992.

Some other matters are discussed by appellants, but in our judgment they are not of sufficient importance to demand farther notice. For the errors indicated the judgment must be *reversed*.

DANIEL SHEA, Appellant, v. THE CATHOLIC SOCIETY OF
WEBSTER CITY, IOWA, Appellee.

Conveyances: MENTAL CAPACITY: UNDUE INFLUENCE: EVIDENCE. A voluntary conveyance of property by one mentally competent and without undue influence will not be disturbed by the court. In this case the evidence is held insufficient to show either a lack of mental capacity or undue influence.

*Appeal from Hamilton District Court.—Hon. R. M.
WRIGHT, Judge.*

MONDAY, APRIL 11, 1910.

ACTION to set aside a deed and to quiet title to real estate. The bill was dismissed, and plaintiff appeals.—*Affirmed.*

D. C. Chase, for appellant.

Wesley Martin, for appellee.

WEAVER, J.—Plaintiff is the only heir of James Shea, deceased. In his lifetime James Shea was the owner in fee of certain residence property in Webster City. He was a communicant of the Catholic Church, and attended its service in that city. On January 25, 1902, he executed a deed for said property to the defendant above named, and delivered it to the priest in charge, who caused it to be recorded. In May, 1905, he was adjudged insane by the commissioners of Hamilton County, and placed under the care and custody of Father O'Brien, the priest of that parish. Later he was cared for at a Catholic hospital in the city of Dubuque, where he died in the year 1907, aged about seventy-five years. The property in controversy was the largest item of his estate, and in the fall of 1904 he made a will leaving all his property to Father O'Brien. The record does not disclose whether this instrument was ever probated. It is the claim of plaintiff that at the date of the will James Shea was of weak, if not of unsound, mind, and that he was very sick and supposed to be about to die, in which condition he was led or induced to make the conveyance by the undue influence of the priest who attended him and administered to his spiritual needs. After hearing considerable evidence on both sides, the trial court found that the charge of mental incompetency and undue influence had not been sustained, and dismissed the bill.

Upon careful consideration of the record, we conclude that the finding of the trial court should not be disturbed. At the date of the deed James Shea was only about seventy years old, an age by no means so great as in itself to afford presumption of serious failure of his mental powers. Several witnesses testify to some lapse in his mental strength at and prior to the date of making the deed, but none of them put the conclusion very strongly. Reduced as near as possible to a single expression, the evidence on part of plaintiff fairly tends to show some weakness or childishness of mind, resulting possibly from the weakening of his physical powers and excess in the use of intoxicants, but not such a failure as to incapacitate him for ordinary business transactions. Of his condition at the very time and place of making the deed none who were present give evidence tending to show lack of capacity on his part. The notary who prepared the conveyance and took the acknowledgment says he appeared all right, and talked rationally. The physician who attended him in that sickness considered him rational. After he recovered from his sickness, he spoke to a lawyer friend, telling him he had conveyed the property to the church, asked if it would be subject to taxation, and expressed regret that the gift had not been in the form of money. The lawyer discovered no sign of mental failure. Altogether we think there is a decided absence of proof of mental incompetency at the time in question.

Upon the charge of undue influence the lack of evidence is even more apparent. It is true the priest was in a position to exercise a powerful influence over the grantor's mind, and, if there were any showing that he abused the confidence reposed in him to induce his parishioner to make the deed, when, if left free to act for himself, it would not have been made, we should not hesitate to reverse. But there is no testimony tending to show request, persuasion, or command on the part of the priest, and all his acts so far as revealed in the record were entirely consistent

with the simple discharge of the kind offices due from a clergyman to a sick member of his flock. So, also, if we assume that the burden is on the defendant to negative the exercise of undue influence, we are of the opinion that such burden is fully satisfied by the affirmative showing made by the witnesses having personal knowledge of the circumstances attending the execution and delivery of the deed. That the deceased should have made the church the beneficiary of his bounty is not altogether strange. It incidentally appears that his wife had separated from him some years before. His son had left home when seventeen years old, and, while returning occasionally to visit his father, the tie between them naturally was not of the strongest, and the church in whose faith he was born doubtless came to seem the only home he had left, and its ministering servants his nearest friends.

The law will not justify us in interfering with his voluntary dispositions of his property, and the decree of the district court must be *affirmed*.

E. V. TUTTLE, Appellee, v. FRED BUNTING and THOMAS OCHAMPAUGH, Appellants.

Intoxicating liquors: NUISANCE: ABANDONMENT OF BUSINESS: INJUNCTION. Where the defendant in a suit to enjoin a liquor nuisance disposes of the property used in connection with the business, and quits the business pending the trial, there is no occasion for the issuance of an injunction, providing the court is satisfied that the defendant is acting in good faith in abandoning the business; but if the evidence of defendant's good faith is not satisfactorily established the court is justified in issuing the injunction notwithstanding the claim of abandonment. In the instant case issuance of an injunction was proper.

*Appeal from Carroll District Court.—Hon. F. M. POWERS,
Judge.*

MONDAY, APRIL 11, 1910.

ACTION to enjoin an alleged liquor nuisance. From a decree for plaintiff, defendants appeal.—*Affirmed.*

L. H. Salinger, for appellants.

M. S. Odle, for appellee.

DEEMER, C. J.—This is an ordinary action to enjoin the defendants from maintaining an alleged liquor nuisance in a certain building in the town of Lanesboro in Carroll County. Defendant Bunting pleaded that at the time of filing his answer he did not own the premises in which the saloon had been conducted; that he had parted with his interest therein January 14, 1909. Defendant Ochampaugh pleaded that he had been a barkeeper for his codefendant prior to July 1, 1908, but that on that day he quit the business and had not been engaged in selling liquor on the premises or at any other place. Each also filed the following pleading:

That it is now, and has been ever since the severing by each of their connection with the traffic in said liquors, their intention, held in good faith, not to re-engage in said traffic in any manner whatsoever in this judicial district or in the state of Iowa, and it is intended by this clause and by this plea to plead an abatement of all matters which the complainant has asked to be relieved against. With the purpose of giving to the complainant herein all relief and all advantage he could have, should a decree of permanent injunction issue herein, these defendants do now by this paper consent that, though no such decree shall issue, judgment shall be entered against them not only for the costs that have accrued to this time in the cause, but for all costs which could properly accrue, should a permanent decree issue, including the fee for complainant's attorney; said judgment to be entered upon computation of the clerk by the direction of the court.

On this pleading they asked that no decree be entered against them and no judgment save for costs tendered as above. The case, upon these issues, was tried to the court upon an agreed statement of facts made by and between the parties and duly filed of record in the case. In this it was stipulated and agreed:

It is stipulated and agreed by and between the parties hereto: That the cause shall be submitted to the court upon the following agreed statement of facts; the plaintiff being represented in this agreement by his attorney, M. S. Odle, and the defendants being represented by their attorneys, B. I. Salinger and L. H. Salinger. That the defendant Fred Bunting was at the time of the commencement of this action engaged in the sale of intoxicating liquors upon the following described premises, to wit, lot 1, block 13, in the town of Lanesboro, Carroll County, Iowa, and that the said Fred Bunting was the owner of the above-described premises. That Thomas Ochampaugh was a clerk and bartender for the said Fred Bunting and engaged in the sale of intoxicating liquors in said building. That, to wit, on May 4, 1908, a hearing was had against the said defendants Fred Bunting and Thos. Ochampaugh and finding made that the said defendants had been engaged at the time of the commencement of this action in the illegal sale of intoxicating liquors on said premises, and a temporary injunction issued against the said defendants, which is still in full force and effect. That on July 28, 1908, a hearing was had against the said defendants for contempt of court for violating the injunction, which was issued against them on May 4, 1908, and a finding made that the defendants had violated said injunction by the illegal sale of intoxicating liquors within this judicial district. That on or about July 1, 1908, the defendant Ochampaugh ceased to be engaged in the sale of intoxicating liquors for the said defendant Fred Bunting on said described premises, or elsewhere in any way within this judicial district. That on or about the 14th day of January, 1909, the defendant Fred Bunting sold his interest in the said liquor business, and also in the said premises, and ceased operating a saloon

and being engaged in the sale of intoxicating liquors or owning or maintaining premises used in any way in said traffic. That the said sale was to a party who has since, and is now, conducting a saloon and a place for the sale of intoxicating liquors on the above described premises; but no complaint has been made in any form that the successor's sales are illegal. It is also stipulated that both defendants are credible witnesses, and that the cause shall be submitted and decided as though they had testified that they had, at the time of the hearing, and when quitting the business, and now have, a good-faith intention not to re-engage in the liquor traffic in Iowa, nor to own or maintain premises in Iowa for said traffic.

The hearing resulted in a decree of permanent injunction which not only enjoined the defendants from the further sale of liquors upon the premises, but also at any other place within the judicial district. It also enjoined all persons from the illegal sale of liquors within the building in question, and Bunting was specially enjoined from permitting the unlawful sale of liquors within the building.

It was further ordered that:

The sheriff of Carroll County, Iowa, abate said nuisance, and the said sheriff is hereby ordered and directed to abate said nuisance by seizing and destroying the liquor therein and by removing from the buildings described herein all furniture, fixtures, vessels, and all movable property used in or about said premises in carrying on said unlawful business, and selling the same in the manner provided by law and by securely closing said buildings and keeping the same securely closed for the period of one year unless sooner released as by law provided, and it is ordered by the court that the abatement bond be and is hereby fixed at \$1,000—ordered reduced to \$700.

Judgment was also recovered against the defendants for costs and attorney's fees, which were made a lien upon the property.

Defendants complain of the decree of permanent in-

junction and also of the order for the abatement of the nuisance. Reliance is placed upon: *Redley v. Greiner*, 117 Iowa, 680; *Patterson v. Nicol*, 115 Iowa, 284; *Drummond v. Drug Co.*, 133 Iowa, 266; *Sharp v. Arnold*, 108 Iowa, 203; and other like cases in support of the appeal. On the other hand, appellee relies upon *Halfman v. Spreen*, 75 Iowa, 309; *Judges v. Kribs*, 71 Iowa, 183; *Danner v. Hotz*, 74 Iowa, 391; *Donnelly v. Smith*, 128 Iowa, 257; *Drummond v. Drug Co.*, 133 Iowa, 266. The distinction between these cases is that, in one class, the trial court was of opinion that defendants had, in good faith, gone out of the business, and did not intend to again re-engage in it at the place in question or at any other place; while, in the other class, although the defendants had ceased the business and professed reformation, the brief time elapsing after the reformation and before trial or other circumstances disclosed were deemed insufficient proof of such repentance as to secure defendants immunity from an injunctional order. The question, after all, is largely one of good faith. In other words, if defendants have, in good faith, parted with the property, have quit the unlawful business, and do not expect or intend to engage in the business of selling liquor unlawfully, there is no occasion for the issuance of the injunction. If, on the other hand, there be doubt as to the defendants' good faith or a question about their repentance, the order will issue to assist in removing the temptation to return to old habits. The stipulation upon which the case was tried is peculiar. It does not say that defendants had in good faith quit the business, but that they would testify that they had. As against this, it appears that, after a temporary writ of injunction had run against them, they failed to observe its provisions, but sold liquor at the place in question in violation, not only of the law, but of the order of court. Thus they displayed their contempt for the order of the court and their disposition to disregard its decrees. If, after being

specifically enjoined, they still continued the unlawful sale of liquors, is there any reason to believe that their oath will be sacredly kept, even if when testifying they intended to observe these provisions? The trial court was justified in issuing the decree which was entered of record.

We may say, in closing, that it is quite an exceptional case which will justify us in disregarding the order of the trial court in such a case. Had the injunction been denied and the appeal had been taken by plaintiff, a different question would arise. In but one case has the trial court been reversed because it issued an injunction after the defendants had quit the business. That was *Sharp v. Arnold*, 108 Iowa, 203. It appeared from the record in that case, however, that the nuisance had been abated, and that defendants had ceased to sell liquors before the action was commenced. In *Patterson v. Nicol*, 115 Iowa, 283, it is expressly held, under such a state of facts as is here shown, that the matter of issuing the injunction is discretionary with the trial court. If that be the true rule, and we think it is, then, as no abuse of discretion is shown in this case, the order should be affirmed.

A significant thing in this case is that, although Bunting claims to have sold the building, it is still being used as a saloon.

No error appears, and the judgment and decree must be, and it is, *affirmed*.

CHARLES P. DUETZMANN, Appellant, v. MRS. M. KUNTZE.

Real property: CONTRACT OF PURCHASE: RESCISSION: WAIVER. A purchaser of real property seeking to rescind the contract on the ground of false representations must do so within a reasonable time; and, where, as in this case, plaintiff made payments upon a contract some time after learning of the false representations, and continued to use the property without intimation of dissatisfaction.

isfaction and with full knowledge of the false statements for a period of several months, the right to rescind was waived.

Municipal corporations: STREETS: ABANDONMENT: ESTOPPEL. Where 2 a town was incorporated several years after the construction of a building extending several feet into the street as platted, and for a period of thirty years thereafter made no objections to such occupancy of the street, but improved the street during that time with reference to the building as being located upon the lot line, it will be presumed to have accepted the street as extending only to the building, or to have abandoned the portion occupied, and is estopped from thereafter asserting title to the same.

Conveyances: COVENANTS: FULFILLMENT. The covenant of a vendor to convey by good and sufficient warranty deed is satisfied by a conveyance of such title, although it may have been acquired by long possession coupled with abandonment by the public.

Real property: RESCISSION OF CONTRACT: NECESSARY PARTIES. The 4 town in this case was not a necessary party to the suit to rescind the contract, although the action involves a determination of whether the vendor by long possession and abandonment by the town had acquired title to that part of the property conveyed which was originally in the street; as that question is determinable without prejudice to the rights of the town.

*Appeal from Mills District Court.—HON. W. R. GREEN,
Judge.*

MONDAY, APRIL 11, 1910.

THE parties hereto entered into a contract, by the terms of which plaintiff undertook to pay defendant \$3,200 for the "west seventy feet of lots 415 to 419, inclusive, and the W. $\frac{1}{2}$ of the N. $\frac{1}{2}$ of lot 414 in Hastings, Iowa," on which there was a hotel with furniture, fixtures, bedding, utensils, and supplies, as follows: \$900 in cash and \$50 every three months until paid for. Whereupon defendant undertook to convey the same to him. He took possession November 1, 1905, and conducted the hotel until September 5, 1908, when this action to rescind the contract was begun. As grounds therefor, he alleged that the execution of the contract was procured

by fraud, in that: (1) Defendant falsely represented the hotel building to be on the said lots, whereas it extended at least seven feet in Tarkio street, and (2) that she falsely represented said building to be new and of sound material, whereas it was an old and decayed building, moved on the lots, somewhat repaired, with an addition thereto. He had paid, at different times, \$1,899, and expended in improvements, consisting of a cave, addition to barn, a squabbery, sidewalk, fence, and the like, the sum of \$655.50, and prayed that the contract be cancelled, and that he have judgment for these amounts, and that the same be established as a lien on the property. The defendant denied the allegations with respect to fraud, and averred that a hotel had stood where the one now does since 1872, and that the west line thereof had always been treated as the street line, and that the town of Hastings, as well as plaintiff, were estopped from denying the ownership thereof. She further averred that plaintiff had continued in the possession and use of the property long after ascertaining the location of the building and its condition when purchased, and was estopped by reason thereof from now asking that the contract be rescinded. The petition was dismissed, and plaintiff appeals.—*Affirmed.*

W. E. Mitchell, for appellant.

Genung & Genung, for appellee.

LADD, J.—The Foster House was erected at Hastings, Iowa, in 1872. The defendant became the owner of it in 1893, and it burned down July 3, 1903. Thereupon she bought an old two-story building, with one side open when detached from another, and moved it on the foundation of the burned house. It was repaired, additions constructed, and a new roof put on, and the struc-

ture, when completed, denominated "Hotel De Rudolph." Defendant had expected her son-in-law to conduct the house, but, as he departed for Germany, she did so, but in the fall of 1905 advertised it for sale in an Omaha paper as a "good sixteen-room hotel, close to depot; nearly new; junction point; cause for sale sickness; this is a snap." The plaintiff, then at Butte, Neb., responded to this advertisement, and the defendant, among other things, wrote: "This is a new building, although I have been here fifteen years. A few years ago it burned down. Then my brother-in-law begged me to rebuild, as he knew there was money here. I did build, but he left for Germany before I had it all built and done so that it was left for me alone to run, but I have the rheumatism so bad at times I can hardly walk or creep. This is why I want to sell and go to a warmer climate." The plaintiff examined the property in detail, entering every room, October 18, 1905, and the outcome was the purchase thereof. At that time, according to his story, she represented that the hotel was newly constructed of the best material the year before and had been occupied since April previous and represented the west side of the building to be on the lot line. On the other hand, defendant testified that in speaking to him she referred to a room as being in the new part of the hotel, told him the cost of that part, and denied having said the house was on the lot line, but, instead, remarked that it was where the old house stood, and her daughter, who had showed him through the building, testified to having referred to a room as in the old part of the hotel, and confirmed her mother's testimony to having mentioned a room to him as being in the new part. All of this was denied by plaintiff. Other evidence was to the effect that the character of the building was readily observable. Plaintiff further testified that, during the first winter, the foundation where the old and new parts joined split in the middle and made

an opening two inches wide, that after that winter the doors would not open and close freely because of the old part sagging, that in 1907 or 1908 the chairs began to break in the floor, that in the spring of that year he discovered the joists were decayed, and that the west wall was not plumb. From a survey it was ascertained that the building extended in Tarkio street seven feet. Plaintiff admits that Young pointed out the line in 1906 or 1907. So that on his own testimony it must be found that he was aware of the condition of the building as early as March, 1908, and, if a man of ordinary observation and judgment, it must have been known to him much earlier. The evidence of others, when considered in connection with his own, leaves no doubt but that he was aware that the hotel extended into the street as early as 1906. And yet, with such knowledge, he continued in its occupation, keeping incubators in the parlor a part of the time, and hatching chickens therein, and enjoying the use of the premises until September, 1908, when this action was begun. His conduct so strongly confirms the contention of defendant that he bought with knowledge that we ought not to interfere with the finding of the trial court.

Ruing his bargain, he first offered to yield the property to defendant upon payment of \$500, and, failing in this, instituted this action to rescind. Even if there were

1. REAL PROPERTY: contract of purchase: rescission: waiver.

misrepresentations as alleged, the plaintiff was required to elect either to execute or rescind the contract at the time of discovering the wrong or within a reasonable time thereafter.

Moore v. Howe, 115 Iowa, 62. What is a reasonable time necessarily depends on circumstances. Here plaintiff paid \$100 on the contract, April 30, 1908, long after he must have ascertained the condition of the building, and, though defendant lived within a few rods from the hotel, gave no intimation of any dissatisfaction on his

part until more than five months after full knowledge had been acquired. Continued use of the hotel and enjoyment of its patronage for this period, in connection with the payment mentioned, waived any right he may have had to rescind. *Moore v. Howe, supra.*

Moreover, the title to the portion of the platted street occupied by the hotel was conclusively shown to be in the plaintiff. The foundation was of brick, and the hotels

had rested thereon since 1872, five or six

2. **MUNICIPAL CORPORATIONS:** years prior to the incorporation of the town
streets: abandonment: of Hastings. Upon incorporation, the town
estoppel.

interposed no objection to the occupation of the portion of the street, and as, in improving it, the hotel was treated as being on the street line for nearly thirty years, it must be assumed to have accepted the street as extending to the hotel or to have abandoned the portion occupied thereby. See *Burroughs v. Cherokee*, 134 Iowa, 429. Other lot owners improved to the same line, and after thirty-six years of occupancy by defendant and her grantors without objection on the part of the town, and, as we think, without thought of it being other than the true line, it is now estopped from asserting title thereto. *Johnson v. City of Burlington*, 95 Iowa, 197.

It is said, however, that plaintiff was not bound to take land in Tarkio avenue. As pointed out, it was no longer therein, and, if he did not buy it, he acquired the

3. **CONVEYANCES:** tract described in the contract and can not
covenants: complain of getting more than he bargained
fulfillment. for. If that in the street was pointed out as a portion of the tract described in the contract, there was no failure of title. That instrument contained no covenant on defendant's part save that upon full payment she would convey by good and sufficient warranty deed. Surely this exacted no more than that she convey title, even though it may have been acquired through long possession coupled with abandonment by the public.

But appellant contends that this issue might not be decided without the town of Hastings being made a party. That it might have been a proper party may be conceded; but, as the court might decide the issue without prejudice to the parties and as any rights the town of Hastings might have, would not be prejudiced thereby, it was not a necessary and indispensable party to the action. Section 3466, Code; *Tod v. Crisman*, 123 Iowa, 700. The motion to strike this defense was not ruled on in the district court, and for this reason is not considered.

The decree is *affirmed*.

JANE GRAHAM, Appellant, v. J. A. McKINNEY, Administrator of the Estate of JOHN CUNNINGHAM, Deceased, et al.

Estates of decedents: CLAIMS: IMPLIED CONTRACT FOR COMPENSATION:

1 EVIDENCE. In proceedings for the establishment of a claim against an administrator on an implied contract to compensate the claimant, the facts implying the agreement must be so well established as to leave no room for conjecture, and when so established the law implies a promise to pay the reasonable value thereof; and the burden of proving that the claim is unpaid is not upon the claimant. In this case the claimant sought to establish a claim for care, board and lodging of the decedent, and the evidence is held to negative the administrators contention that decedent had merely taken meals at claimant's house, without contemplation on the part of either that he should pay therefor

Same: EVIDENCE: TRANSACTIONS WITH A DECEDENT. In an action 2 against an administrator for board, lodging and care furnished decedent, the inquiries of claimant as to whether decedent roomed and boarded elsewhere and whether others rendered him similar service during his illness, were not objectionable, under the statute prohibiting a party from testifying to personal transactions with a decedent; but an inquiry as to what amount of board or care decedent required related to a personal transaction with him to which the plaintiff was not competent to testify.

*Appeal from Polk District Court.—Hon. Jesse A. Miller,
Judge.*

MONDAY, APRIL 11, 1910.

A CLAIM "on account of board, lodging, mending, and keep, rendered and furnished to said decedent at his special instance and request" was filed by Jane Graham with the administrator of the estate of John Cunningham, deceased. Upon trial, at the conclusion of the evidence introduced by claimant, the court on motion directed the jury to return a verdict for the administrator, which was done, and judgment entered thereon. The claimant appeals.—*Reversed.*

Gillespie & Bannister, for appellant.

Mills & Perry for appellee McKinney.

John McLennan and J. M. Graham, for appellees McGuire and Cunningham.

LADD, J.—The claimant kept a boarding and rooming house at 326 East Fifth street in Des Moines. The evidence that deceased, who was not related to her, had occupied a room therein and boarded with her for three or four years prior to his death on November 17, 1907, was uncontradicted. Cummings testified that deceased had roomed there three and one-half years, and that for six months of this time he ate supper with him at claimant's table. Mrs. Priest testified that he had boarded and roomed there three years, and her testimony was corroborated by that of the other witnesses.

I. The suggestion of appellees that the proof was that he had merely been seen at the place or at the table in a few instances or at certain times is not borne out by the

record. Moreover, the record disclosed that he was frequently in ill health, and that claimant cared for him. Having furnished him board and a room and rendered services in his care, the law implied a promise on his part that he would pay the reasonable value thereof.

1. **ESTATES OF DECEDENTS:** claims; implied contract for compensation; evidence. Such value was shown, and a witness testified to a conversation in 1906, and another in 1907, wherein deceased was said to have admitted that he had not paid claimant for his board and room, but expected to see that she was taken care of. Nevertheless, a verdict was directed for the administrator. In such a case the facts justifying the implication of an agreement to pay must be well established and nothing left to conjecture. *Bartholomew v. Adams*, 143 Iowa, 354. This requirement was met, and, as the statute (section 3340, Code) expressly declares that "the burden of proving that a claim is unpaid shall not be placed upon a party filing a claim against the estate," a case was made for the jury.

II. Claimant, in the course of her examination, was asked, in substance, (1) whether he had roomed and boarded elsewhere than at her house; (2) what amount of board or care of him was required; and (3) whether any person other than herself had rendered him any services during his illness.

2. **SAME: evidence: transactions with a decedent.** Objection to each of these inquiries was interposed on the ground that the witness was incompetent, under section 4604 of the Code, prohibiting her from being "examined as a witness in regard to any personal transaction or communication between" herself and deceased. Objection to the first and third inquiries should have been overruled. Neither called for a personal transaction, though, had answers been in the negative, it might have been inferred that he roomed and boarded, if at all, at plaintiff's house, and that she might have cared for him when sick. *McElhenney v. Hendricks*, 82 Iowa, 657:

Campbell v. Collins, 133 Iowa, 152. In the last case, we said the statute was not designed to exclude testimony not itself obnoxious to its prohibition, from which inference of what was done between the parties might be drawn. The objection to the second inquiry was rightly sustained. The witness knew of the amount of care exacted from deceased only from personal transactions with him, and the question called for her conclusion with reference thereto.

Other questions raised will not be likely to arise on another trial.

Because of the errors pointed out, the judgment is *reversed*.

CHARLES S. BLACKETT, FRANCIS H. BLACKETT, ELIZABETH W. TUTHILL, LOUISA A. MATHIS, WILLIAM L. BLACKETT and MARTHA C. BLACKETT, Appellants, v. S. B. ZIEGLER, Executor of the Estate of ELIZABETH W. LEWIS.

Appeal: BRIEFS: SPECIFICATION OF ERRORS: REVIEW. Although a formal assignment of errors on appeal is no longer essential, still the appellant's brief should indicate clearly the errors he desires to have reviewed; and while it is desirable that the Supreme Court rule relating to brief making should be observed, failure to do so is not jurisdictional, and the court is not required to decline to pass upon asserted errors, even though the brief does not comply with the rule.

Pleadings: DEMURRER: AMENDMENT: MOTION TO STRIKE. Where a demurrer to a petition was sustained and the defendant moved to strike an amended petition on the ground that it did not obviate the ruling on the demurrer, the court if convinced that a mistake was made in sustaining the demurrer could set aside the order and overrule the same, and the real question thus presented by the motion was the sufficiency of the petition with the amendment.

Trusts: LIMITATION OF ACTIONS. Ordinarily the denial by a trustee of the rights of the *cestui que* trust, so that his possession be-

comes adverse, will set the statute of limitations in operation; and a transferee of the trust property becomes a trustee by construction of law, so that the statute of limitations begins to run from the time of transfer, or as soon as the *cestui que* trust has knowledge thereof.

Same: REMAINDERS. Where property is left to one in trust for life,
4 upon his death to become the property of his heirs, and during
the life estate the trustee transfers the property, the remainder-
man, in the absence of other circumstances, may assume that it
is held by the transferee subject to his claim, and the statute of
limitations will not commence to run against an action by him
to preserve the trust until the life estate is terminated.

Same: FORMER ADJUDICATION: PLEADINGS. In this action to preserve
5 and enforce a trust alleged to have been created by the testator
in favor of one of his children, the remainder to plaintiffs, his
heirs, the petition alleged that the executor conveyed certain real
estate at a sum less than its value to his wife, one of the testator's heirs, with knowledge of the wife as to its actual value
and of the trust impressed upon the property; that subsequently
the executor turned over to his wife a portion of the trust fund;
that the executor died and upon administration of his estate the
remaining trust funds were turned over to his wife, but this was
not alleged to have been done in settlement of the trust fund,
nor was the discharge of the executor as trustee alleged, nor that
the distribution was ordered or approved, although it was alleged
that the plaintiffs were represented in the probate proceedings in
a perfunctory way by a guardian *ad litem*. Plaintiffs ask that the
trust fund be turned over to a trustee. *Held*, that the petition was
not demurrable on the ground that the matters alleged had been
adjudicated in the probate proceedings.

Same. In the absence of allegations to that effect it will not be pre-
6 sumed that the wife intended to hold the property in opposition
to the terms of the trust and adversely to the plaintiff; and her
holding with knowledge, as alleged, was not such a repudiation
of the trust as would start the running of the statute of limita-
tions against the plaintiff, so that the petition did not show on
its face that the action was barred, thus rendering it subject to
demurrer.

*Appeal from Fayette District Court.—Hon. L. E. FEL-
LOWS, Judge.*

MONDAY, APRIL 11, 1910.

WILLIAM BLACKETT died testate October 5, 1879. His will was admitted to probate December 1st of the same year. It left all his property to his wife during her life, and directed that both real and personal property be converted into money by the executors of his estate, "and divided into three equal parts among my three children, as follows, to wit: One share to my son H. S. Blackett of Lawler, Chickasaw County, Iowa, and one share to my daughter Elizabeth W. Lewis of Clermont, Iowa, the remaining one-third to be invested by said executors in first mortgages on farm property at the highest legal rate of interest that can be obtained, and the net amount of proceeds to be paid to my son James P. Blackett of Clermont, Iowa, during the term of his natural life, and after his death the said share to be the property of the natural heirs of the said James P. Blackett according to the legal course of descent and inheritance." W. C. Lewis, the husband of one of the beneficiaries, and H. S. Blackett were named as executors. The petition alleged that plaintiffs were the children of James P. Blackett, and, in substance, that the entire fund held by the executor in trust for the benefit of said James and children had been transferred to Elizabeth W. Lewis by the executor, and prayed that she account therefor. Thereafter Mrs. Lewis died, and S. B. Ziegler, the executor of her estate, was substituted as defendant. A demurrer to the petition was sustained, and plaintiffs granted leave to plead over. They filed an amendment thereto withdrawing all of it after the first paragraph and alleging other matters differently. A motion to strike this was sustained. The plaintiffs elected to stand on the ruling, and the petition as amended was dismissed. They appeal.—*Reversed.*

C. S. Blackett, Preston & Fletcher, and W. C. Lewis,
for appellants.

S. B. Ziegler, W. J. Ainsworth, and Clements & Estey, for appellee.

LADD, J.—I. Appellee challenges the propriety of considering this appeal, for that, as is argued, no errors for reversal are assigned. The formal assignment of errors

1. **APPEAL:**
briefs:
specification
of errors:
review.

is no longer essential; but in the preparation of his brief the appellant is still required to indicate to this court in an understandable way the errors in the rulings of the trial court which he seeks to have reviewed. *Cooper v. City of Oelwein*, 145 Iowa, 181. It is desirable, as a matter of convenience, that the order prescribed in rule 54 shall be adhered to in brief making; but this is not jurisdictional, and the court ought not to decline to pass on errors asserted even though, as in this case, the brief does not proceed in the orderly way suggested by that rule.

Four errors are assigned, and authorities said to lay down certain principles are cited, and, even though the argument is meager and indicative of slight attention having been bestowed on the important questions involved, this is not ground for declining to review the rulings complained of.

II. After a demurrer to the petition as first amended had been sustained, a second amendment thereto was filed, and on motion was stricken from the record. This is said

2. **PLEADINGS:**
demurrer:
amendment:
motion to
strike.

to have been erroneous on three grounds: (1) Because the last amendment added Augusta B. Blackett as a party plaintiff; (2) for that it was a substitute for all former pleadings and corrections of statements of fact pleaded before and was not vulnerable to demurrer because barred by the statute of limitations or to the plea of *res adjudicata*; and (3) that the court in sustaining the demurrer was in error and should have corrected the ruling by overruling the motion to strike. The brief contains little, if

anything, more than a bare statement of these propositions; but the points raised are apparent upon the reading of the pleading. Taking the assignments of error up together, it is to be said that, had the court become convinced of a mistake in sustaining the demurrer, the order doing so might have been set aside and it overruled. *Jenkins v. Shields*, 36 Iowa, 526. So too, if because of the allegations of new matter in the second amendment, material corrections in the former pleading were made, or important defects cured, and thereby the ground or grounds on which the demurrer was sustained obviated, the motion to strike should have been overruled. But if the demurrer was rightly sustained, and the ruling was not obviated by allegations in the last amendment to the petition, the order striking such amendment was rightly entered. *Wapello State Savings Bank v. Colton*, 143 Iowa, 359; *Express Co. v. Des Moines National Bank*, 146 Iowa, 448. The result is that if the petition as amended stated a good cause of action, the court erred in striking the amendment which withdrew all the allegations of the petition save those with respect to testator's death and the admission of his will to probate, and therefore the sufficiency of the petition with the amendment alone need be considered.

III. The other assignment of error is "that, under the terms of the William Blackett will, an express trust was created which could not be matured during the life estate by either trustee or remainderman."

^{3. Trustees: limitation of actions.} One-third of the testator's estate, after being reduced to money, was to be invested in real estate mortgages by the executors, and the net income paid to James P. Blackett during life, and upon his death the share to be the property of his natural heirs "according to legal course of descent and inheritance." Manifestly, this created an express trust under which the executor, as trustee, was required to deal with the property impartially as between the life tenant and the remainder-

man. While the trust so created subsisted, the statute of limitations might not have been invoked as a bar to suit for its enforcement by the *cestui que* trust. Ordinarily, upon denial of the right of the *cestui que* trust by the trustee, so that his possession of the trust estate may be said to have become adverse to any claim of the *cestui que* trust, lapse of time may be interposed by way of a plea in bar. These rules have been of universal application at least since *Marquis of Cholmondeley v. Lord Clinton*, 1 Jac. & W. 1, and *Kane v. Bloodgood*, 7 Johns. Ch. (N. Y.) 90 (11 Am. Dec. 417), and were applied by this court in *Wilson v. Green*, 49 Iowa, 251. Moreover, property, whether real or personal, which is impressed with or subject to such trust, when transferred or conveyed by the trustee, not in the course of executing the trust, to a mere volunteer or purchaser for value with notice, is not relieved therefrom but continues, and such volunteer or purchaser acquires and holds the property subject to the same trust which previously impressed the property and becomes the trustee for the original beneficiary. "Equity impresses the trust upon the property in the hands of the transferee or purchaser, compels him to perform the trust if it be active, and to hold the property subject to the trust, and renders him liable to all the remedies which may be proper for enforcing the right of the beneficiary." 3 Pom. Eq., section 1048. Such transferee or purchaser is trustee by construction of law, and, of course, the statute of limitations ordinarily would begin to run from the time of the transfer, or as soon thereafter as the *cestui que* trust were advised of the fact. *Neal v. Bleckley*, 51 S. C. 506 (29 S. E. 249); *Johnson v. Prairie*, 91 N. C. 160. But this can only be so where the *cestui que* trust is not prevented from suing by disability or not being entitled to possession. *Parker v. Hall*, 2 Head (Tenn.) 641; *Duckett v. National Mechanics'*

Bank, 86 Md. 400 (38 Atl. 983, 39 L. R. A. 84, 63 Am. St. Rep. 513); *McCoy v. Poor*, 56 Md. 197.

The principle is well stated in Wood on Limitations, section 208:

When the legal title of property is vested in a trustee who can sue for it, and fails to do so within the statutory period, an infant *cestui* who has only an equitable interest will also be barred; (a) but the rule is otherwise when the legal title is vested in the infant, or cast upon him by operation of law. The rule only applies in cases where the trustee might have brought an action, but neglected to do so. If he has estopped himself from suing by a sale of the property, thus uniting with the purchaser in a breach of his trust, the wrong is to the beneficiaries, not to him, and, while he can not sue, the beneficiaries, if under any disability, are not affected by the statute. And if the *cestui* trust was ignorant of the sale, and the purchaser knew of the trust, the *cestui que* trust will not be barred. . . . The rule is that a person who purchases of a trustee the whole or part of the trust property, bona fide, and without notice or knowledge of the trust, will acquire a good title as against the *cestui que* trust; but a person who purchases trust property with notice of the trust holds the title as trustee, and stands in the place of his grantor, and is chargeable with the trust.

In Perry on Trusts, section 860, the author, after observing that the transferee of an express trust is not a trustee save by construction of law until so decreed, and that, upon denial of the trust, an adverse holding, if continued for the statutory period, will bar recovery by the *cestui que* trust, adds: "But, in these cases, the rights of the *cestui que* trust can not be barred until his rights fall into possession. If, therefore, the *cestui que* trust holds only in remainder or reversion, the statute will not begin to run until his right to the possession falls in by the determination of the particular estate. So, if the

cestui que trust is under disability, the statute will not begin to run until the disability is removed."

The principle with reference to remaindermen was recognized in *McCoy v. Poor*, 56 Md. 197; but there the estate in remainder was coupled with a present interest,

* SAME:
remainders. and for this reason the action was held to be barred. In *Murray v. Quigley*, 119

Iowa, 6, the remainder had vested; but in *Westcott v. Meeker*, 144 Iowa, 311, involving real estate, the life tenant executed a deed purporting to convey the entire estate. The grantees had been in possession thereunder claiming absolute ownership for about thirty-five years, and the court held that such possession was not adverse to the heirs of the life tenant, who died in 1906, on the theory that no one could say until the death of the life tenant who his heirs would be. In this respect, the remainder was declared to have been contingent, and, as it had not vested until the death of the life tenant, the remaindermen until then had no right in possession or expectancy which might be asserted to the realty. Possibly cases may arise where the assertion of title to property acquired from a trustee of an express trust is so direct and hostile as to challenge action on peril of loss through the running of the statute; but, in the absence of anything other than the transfer of the property and the continued possession of the trustee, the remainderman may assume that it is held subject to his claim to and right therein, and, under these circumstances, the statute of limitations will not begin to run until the life estate has terminated.

Here the action is not for the recovery of the property, but the relief sought is preservation of the estate and the execution of the trust according to the terms of the will. True, the interest of the plaintiff is contingent upon surviving the life tenant; but in this respect somewhat like the inchoate right of dower, and for like reasons, an action is maintainable to protect the same. *Buzick*

v. *Buzick*, 44 Iowa, 259; *Atwood v. Arnold*, 23 R. I. 609 (51 Atl. 216); *Clifford v. Kampfe*, 147 N. Y. 385 (42 N. E. 1); *Chantland v. Sherman*, 148 Iowa, 352.

IV. Reverting now to the petition, we find that it alleges the admission to probate of the will of William Blackett deceased, in December, 1879. The will is attached thereto, from which it appears that <sup>s. SAME: for-
mer adjudic-
ation:
pleadings.</sup> the deceased divided his property in three equal shares, leaving one-third to H. S. Blackett, one-third to his daughter, Elizabeth W. Lewis, and the remaining one-third "to be invested by said executors in first mortgages on farm property at the highest legal rate of interest that can be obtained and the net amount of proceeds to be paid to my son, James P. Blackett of Clermont, Iowa, during the term of his natural life, and after his death the said share to be the property of the natural heirs of said James P. Blackett according to the legal course of descent and inheritance." The amendment to the petition alleged that plaintiffs are the children and wife of said James P. Blackett; that by the terms of said will one-third of the estate was directed to be diverted into a trust fund by the executor and thereafter to be by him applied as above stated; that W. C. Lewis, husband of Elizabeth Lewis, was appointed executor of the estate of William Blackett in December, 1879, and took possession of all the property of the estate, being personal property of the value of \$8,620, and real estate of the value of \$15,000, of which property \$7,875 was held by him as trustee under the will as stated; that on July 21, 1887, the said executor conveyed to his wife, Elizabeth W. Lewis, certain real estate for the consideration of \$1,864, but of the actual value of \$12,000, the grantee knowing the value thereof and of the trust impressed thereon; that about August 15th, of the same year, the executor turned over to Mrs. Lewis the sum of \$1,338 of the trust fund referred to; that this sum re-

mained in the possession and control of Mrs. Lewis until her death, she knowing the character of said fund; that said executor transferred other real property for the consideration of \$4,400, but of the actual value of \$5,000; that at the time of said executor's death, November 20, 1888, the sum of \$2,868 belonging to the trust fund remained in his possession; that H. S. Blackett, one of the heirs and legatees under the will, assigned all of his interest in the estate to the executor in satisfaction of his indebtedness to the estate; that on July 21, 1887, Mrs. Lewis was owner of one-half of the property conveyed to her, and the remaining one-half was a part of the trust fund; that plaintiffs are damaged by reason of said transfer in the sum of \$4,568; that on May 20, 1890, the estate of the executor, W. C. Lewis, was administered upon, and "all of the property of said estate, in which was included and intermingled the sum of about \$2,868 of the trust fund aforesaid, was at the distribution of the said estate turned over to Elizabeth W. Lewis, heir and legatee thereof, and remained in her possession and control up to the time of her demise, but the sum was turned over to her and received by her with full knowledge of such trust;" that S. B. Zeigler, executor of her estate, has in his possession and control \$8,775, which is the trust fund here created, by and under the terms of the last will of William Blackett, and the estate of Mrs. Lewis is ready for distribution, and plaintiffs ask that the property belonging to said trust be set aside and the trust preserved; that James P. Blackett, the life tenant under said trust, is still alive, and, though plaintiffs are not entitled to the possession of the trust fund, ask that the property of the trust be preserved for their benefit; that plaintiffs have no plain, speedy, and adequate remedy at law, and they pray that the said executor "be ordered to turn over the said trust fund with interest thereon to such suitable person as trustee of said fund as the court may

direct; and that he be directed not to distribute same as belonging to the estate of Mrs. Lewis and for general equitable relief."

The motion to strike was based on two grounds: (1) That allegations of a previous amendment, filed in response to a motion for more specific statement, were omitted from the last amendment, and other facts omitted to avoid their legal effect, and attempts to state a new cause of action; and (2) that any change therein does not obviate the ruling on the demurrer to the petition. Taking up these grounds in the order mentioned, it is enough to say that the allegations of the amendment in response to the ruling on the motion for specific statement are included. Nor do we think omissions of matters in the original petition may be said to have been made with the view merely of avoiding their legal effect. True, the so-called "trust fund" is more specifically described in the original petition by alleging that upon distribution of the estate the executor turned over to Mrs. Lewis the one-third thereof assigned to her by the testator's widow, one-third of the remaining two thirds as her share, another one-third of said two-thirds derived from H. S. Blackett in satisfaction of the claim of the estate against him, and that the last one-third of said two-thirds was offset against a judgment which he had obtained against James P. Blackett and delivered to her; so that, in the words of the petition, "the executor thereof turned over to the defendant, and the defendant received as her absolute property, the entire proceeds of the estate."

Clearly enough, if the share of H. S. Blackett, having been transferred to the executor in satisfaction of an indebtedness owing the estate, should have been distributed according to the terms of the will and the interest of the heirs to be of James P. Blackett, it could not be appropriated to the satisfaction of the judgment of the executor against the life tenant. Regardless of whether the

interest of the life tenant was thereby extinguished, that of the said heirs could not be thus appropriated to the discharge of the judgment against him. In so far, then, as they are concerned, a part of the estate was alleged to have been transferred without authority of law to Mrs. Lewis. This is not alleged to have been done in settlement of the trust fund, the care of which devolved on the executor as trustee; nor does the petition allege the discharge of the executor as such. Neither the report of the executor nor the notice thereof was set out. Indeed, it was not averred there was either, or that the distribution was ordered or approved by the court, though plaintiffs alleged that they were not represented in the final distribution, save in a perfunctory way, by a guardian *ad litem* appointed by the court.

Even if it were to be inferred from this that some notice was served authorizing such action of the court, such inference ought not go to the extent of presuming that it was of a particular report or application, praying that the executor be permitted to violate the terms of a trust when even the existence of such a report or application has not been averred. As the distribution said to have been made was not such as any court when advised would have made, it is not to be presumed that it was by virtue of judicial order or approval. In the orderly course of procedure, the executor's account must have been settled, and the portions of the estate not held in trust distributed, and the executor continued as trustee of the trust fund for the benefit of the *cestuis que trustent*. Instead, as alleged in the original petition, he transferred this to Mrs. Lewis as her absolute property, and she received it as such. As she also took under the will, she must have been aware of its contents, and therefore of the fact that one-third of the amount received by her was impressed with a trust in favor of the heirs of James P. Blackett upon his death. The last amendment, then, omit-

ted nothing done under official sanction of the court which would avoid the previous ruling. But several conclusions of fact were omitted, such as that Mrs. Lewis received the property from the executor as in her own right, and, though the property said to be held in trust is designated, its derivation is not so particularly described. The amendment in these respects is not open to exception, for the very object in filing it was to obviate the legal conclusion announced in the ruling on the demurrer. The correctness of the ruling on the second ground of the motion depends on whether the petition as amended is vulnerable to the demurrer interposed to the petition. It was in three paragraphs: (1) That the action was barred by the statute of limitations; (2) that the matters set up had been adjudicated in the probate court; and (3) that the facts stated did not entitle the plaintiffs to the relief demanded. Enough has been said to dispose of the second of these.

The amended petition contains nothing indicating that Mrs. Lewis received or claimed the trust fund as her own. The allegations as seen are that she received \$1,338

^{6. SAME.} thereof knowing that it belonged to the trust fund and retained it until her death as she did \$2,868 thereof mingled with other funds. In the absence of allegation to that effect, it is not to be presumed that she intended to hold this property for other purposes than in compliance with the provisions of the will and for the benefit of those entitled thereto. The executor, doubtless in transferring the property as alleged, violated his duties as trustee; but merely receiving the funds with knowledge of their character and retaining them as alleged was not a repudiation of the trust impressed thereon in favor of those who might take the remainder upon the death of the life tenant, and which Mrs. Lewis thereby impliedly undertook to execute, and for this reason the statute of limitations does not appear from the face of the amended petition to have begun to

run. To start the statute in such a case, there must have been some claim adverse to the interest of the remaindermen as such, and not merely possession of the property.—*Reversed.*

GEORGE M. ROSS, Appellant, v. DOWDEN MANUFACTURING COMPANY.

Judgments: FORMER ADJUDICATION: CONCLUSIVENESS.

All issues of fact or law which are or might have been adjudicated in a former suit between the same parties are concluded by the judgment therein; but a former adjudication does not affect after acquired rights or claims which the parties had no opportunity to litigate.

Same: PATENTS: LICENSE TO USE SAME: LIABILITY FOR ROYALTIES.

A final adjudication declaring a patent invalid relieves a licensee from liability for royalties claimed after he repudiated the license, and prior to the adjudication; but so long as the licensee recognizes the right to use the patent and acts thereunder, he is liable for royalties accruing under his contract with the patentee therefor.

Same: FAILURE OF CONSIDERATION.

An invalid patent creates no right in favor of the patentee against one who in no manner recognizes its validity or a license to use it, and will not furnish any protection to a licensee thereunder, and hence there is a failure of the consideration for a contract to pay royalties.

Appeal from Jasper District Court.—Hon. W. H. McHENRY, Judge.

THURSDAY, NOVEMBER 18, 1909.

REHEARING DENIED, TUESDAY, APRIL 12, 1910.

SUIT on an oral contract to recover certain payments alleged to be due as royalties on a patented device to be attached to a potato digger, called an "auxiliary rear conveyor." The case was tried to the court without a jury,

and judgment was rendered for the defendant. The plaintiff appeals.—*Affirmed.*

Dunshee & Haines and *W. R. Lane*, for appellant.

William B. Brown, for appellee.

SHERWIN, J.—The plaintiff alleges: That he devised a rear conveyor to be attached to the Dowden potato diggers, and orally agreed to permit the Dowden Manufacturing Company to use his model of said rear conveyor in manufacturing the same; that in consideration therefor it was agreed that said manufacturing company should make rear conveyors of said type, and pay the plaintiff seventy-five cents for each rear conveyor it made and sold; that the manufacturing company accepted said model, and thereafter made rear conveyors of said type, and voluntarily paid the plaintiff for each one made and sold during 1900, 1901, and 1902, and that plaintiff obtained a judgment against the defendant for the conveyors made from March 1, 1903, to March 1, 1904, and that the defendant paid said judgment, and that said judgment is a conclusive adjudication of the present action. In its answer the defendant denies the contract alleged in the petition, denies that the use of the model was a part of the consideration for the contract it did make, and denies that the former suit involved only a contract for the use of said model, or that said judgment operated as an adjudication of the case at bar. The defendant affirmatively alleges: That, when the plaintiff constructed said model, both parties supposed his device was new and embodied invention; that thereafter the plaintiff applied for and received a patent thereon; that, after said patent was issued to the plaintiff, both parties believing said patent to be valid, and that said device embodied invention, agreed that the defendant should make rear conveyors of said patented

device under the protection of said patent; and that the defendant should pay the plaintiff seventy-five cents for each rear conveyor it thereafter made and sold. The defendant further alleged: That shortly prior to April 1, 1904, it expressly repudiated said contract and notified Ross of its intention not to be bound longer thereby and not to pay him any farther royalty, because said patented device did not embody invention; that thereafter, with full knowledge of the facts of the defendant's repudiation of said contract, the plaintiff on June 7, 1904, sued the defendant in the federal court as an infringer of said patent, and in his complaint prayed that the defendant be enjoined from making or using said patented device; that said action was prosecuted to a final determination, and judgment rendered therein declaring said patent invalid for want of invention, and dismissing the plaintiff's bill; that by said suit in the federal court the plaintiff elected to rescind the contract and elected his remedy. The answer further alleges that the consideration for said contract has failed because of the invalidity of the patent, and that the plaintiff is estopped to maintain this action.

There can be no serious doubt as to the real contract made by the parties. There is no claim that any contract was entered into before the patent was issued to the appellant. The patent was believed to be valid by both parties, and, relying upon its validity and the protection of the defendant thereunder, they entered into an agreement whereby the defendant was to pay a royalty of seventy-five cents for each conveyor made and sold by the company. The company paid all royalties due up to March 1, 1904, and shortly thereafter repudiated the contract and notified the plaintiff that it would no longer be bound thereby, or pay further royalties. This repudiation, as we understand the record, was made at a time when no royalties had been earned that were not paid.

Was there an adjudication of the right of the plain-

tiff to recover royalties for the conveyors made and sold after April 1, 1904? We think the question must be answered in the negative. It is a settled rule of law that all issues of fact or law which might have been adjudicated in the former suit are now foreclosed; but it is also as well established that a former adjudication never affects after-acquired rights, or claims which the parties had no opportunity to litigate. *Rivers v. Rivers*, 65 Iowa, 568; *Dwyer v. Goran*, 29 Iowa, 126.

The former suit for royalties was brought in August, 1904, for the royalties earned for the year preceding March 1, 1904. The defendant did not repudiate the contract

so that such repudiation might be interposed as a defense to an action for royalties until shortly before the 1st of April, 1904. Up

to the time of the repudiation he recognized the license and acted thereunder, and by well-settled authority he was liable for the royalties which accrued under the terms of the license. 22 Am. & Eng. Enc. of Law, 441, 442, and cases cited in note 1. But shortly prior to the 1st of April, 1904, there was a clear, definite, and unequivocal notice to the plaintiff that the defendant no longer claimed the protection of the license, and that he would pay no further royalties for the use of the device. If the patent had been valid, such action on the part of the defendant would undoubtedly have made it liable as an infringer, but not otherwise. The patent was declared invalid by the federal court in 1906, and, as that adjudication was final, it relieved the defendant from all liability for royalties claimed to have been earned after he repudiated his license. 22 Am. & Eng. Enc. of Law, 442; *Macon Knitting Co. v. Mills*, 65 N. J. Eq. 138 (55 Atl. 401); *Ross v. Fuller & Warren* (C. C.), 105 Fed. 510; *Marston v. Swett*, 82 N. Y. 527.

An invalid patent can create no rights in favor of

the patentee against one who in no way recognizes the validity of such patent or a license to use it. The patent being invalid, it could not and did not furnish any protection to the defendant as a licensee thereunder, and hence there was a failure of consideration. *Macon Knitting Co. v. Mills, supra; Percival v. Harger, 40 Iowa, 286, and Rawson v. Harger, 48 Iowa, 269,* relied upon by the appellant, do not conflict with the views expressed herein.

3. SAME: failure of consideration.
We are also inclined to the view that, when the plaintiff brought an action for the infringement of the patent, he elected to treat the license as at an end, and to rely upon his rights against the defendant as an infringer; but we need not determine the question definitely, and do not do so.

The judgment of the district court is right, and it is *affirmed.*

J. W. TYRELL, Executor, Appellant, v. WILLIAM SHANNON ET AL., Appellees.

Homestead: ABANDONMENT: EVIDENCE. In this proceeding to sell real property claimed as a homestead to pay the debts of a decedent, the evidence is held to show that decedent, while occupying the property with a married son, left the same for a visit with relatives intending to return, but was prevented from doing so by reason of a personal injury from the effects of which he died, and that there was not an abandonment of the homestead.

Appeal: QUESTIONS NOT WITHIN THE ISSUES: REVIEW. Questions not within the pleadings and not presented and passed upon by the trial court are not subject to review on appeal.

Appeal from Polk District Court.—Hon. W. H. McHENRY, Judge.

TUESDAY, NOVEMBER 23, 1909.

REHEARING DENIED, TUESDAY, APRIL 12, 1910.

THIS is a proceeding upon the petition of an executor to sell real estate. The court denied his application, and he appeals.—*Affirmed.*

L. A. Smyers, for appellant.

Jas. A. Merritt, for appellees.

EVANS, C. J.—The pleadings in this case are very indefinite. The petition alleges that the plaintiff is the executor of the estate of Daniel Shannon, and that he has filed with the clerk a statement of all claims, that there was no personal property of any kind, and that the decedent was the owner of a certain twenty acres of land. Whether there was a prayer to the petition does not appear from the abstract, nor does it appear therefrom who are the defendants except as above indicated in the title. The answering defendants describe themselves as “the heirs at law and children of Daniel Shannon.” They aver that the twenty acres in question was the homestead of the deceased at the time of his death, and that they are entitled to hold it free from the debts of the deceased. By reply the executor denies that the same was a homestead, and denies that it was so used by the decedent for some years prior to his death. He also avers that the property was within the corporate limits of Des Moines.

From the evidence and the arguments we infer that the proceeding is one brought under section 3323 of the Code, and is an application for an order to sell real estate to pay debts. On the trial evidence, the will of the decedent was introduced in evidence. The executor also testified that the claims filed

1. HOMESTEAD:
abandonment:
evidence.

against the estate were over \$400, the larger part of which consisted of the claims of the executor himself for medical services. Whether the claims had ever been allowed does not appear. Apart from this testimony of the executor, the only issue to which the evidence was directed was whether or not the real estate in question was the homestead of the decedent at the time of his death. The decedent acquired it about twenty years before his death, and after the death of his wife. He occupied it as a home with his three children, one of whom was a minor. After some years he rented it temporarily, and returned again to its occupancy after three years; his married son returning with him. While on a visit to his daughter in 1906, he met with a serious accident, the breaking of his thigh. As a result of this accident, from which he never recovered, he was unable to be taken home, and he died in about one year and a half after such accident. There was other evidence bearing on his intention to maintain and return to his home. The trial court found that the property in question was his homestead at the time of his decease. We think this finding is well supported by the evidence. The court also denied the application to sell.

Plaintiff's argument takes a somewhat broader scope than the pleadings, and argues some questions which do not seem to have been presented to the lower court, nor

to have been passed on by the trial judge.

2. APPEAL:
questions
not within
the issues:
review.

The proceeding was in probate, and is triable here only on errors. The pleadings as they were narrowed the scope of the inquiry.

On the issues thus made, the court reached a proper conclusion. Beyond this we have no occasion to go.—*Affirmed.*

WILLIAM BRUGGEMAN, Appellant, v. THE ILLINOIS CENTRAL RAILROAD COMPANY, Appellee.

Evidence: INVASION OF PROVINCE OF JURY. Interrogatories calling for
1 the very matters which it is the province of the jury to determine
should be denied; as where the engineer of a train was asked
whether he could by any possibility have stopped the train in
a shorter distance, and whether it could have been stopped by
any human agency in a shorter distance, as this was a vital
issue in the case.

Evidence: ADMISSIBILITY OF DOCUMENTARY EVIDENCE. Books upon the
2 subject of air brakes, purporting to give the distance at which
trains moving at different rates of speed can be stopped by an
application of the brakes, are not admissible in evidence to show
such facts because not relating to any exact science; and further,
because not revealing the conditions under which the tests were
made: And aside from such objections the question of admissi-
bility is within the sound discretion of the court.

Evidence: HYPOTHETICAL QUESTIONS: PREJUDICIAL REMARKS OF COURT.
3 Where the evidence was sufficient to support a hypothetical ques-
tion it was error for the court to remark in the presence of the
jury that the testimony did not show certain facts assumed in
the question.

Railways: CROSSING ACCIDENT: SIGNALS: NEGLIGENCE: INSTRUCTION.
4 The statute requiring a sounding of the engine whistle and ring-
ing of the bell on approaching a highway crossing, while not ap-
plicable to street crossings within the limits of cities or towns,
so far as sounding the whistle is concerned, does apply in both
respects when the train is approaching a crossing within an un-
incorporated village; so that where a crossing accident happens
in an unincorporated village, and one of the grounds of negli-
gence alleged is failure to give the statutory signals on approach-
ing the crossing, the jury should be fully instructed with rela-
tion to the statutory signals.

Same: CROSSING SIGNALS: RATE OF SPEED: INSTRUCTION. In an ac-
5 tion for the negligent operation of a train over a highway cross-
ing, grounded both upon failure to give statutory signals and exces-
sive rate of speed, an instruction that the speed of the train would
not of itself constitute negligence but might be considered in deter-

mining whether reasonable and adequate signals were given, together with the other proven facts bearing on that issue, was insufficient, because presenting but one side of the question; since it eliminated consideration of speed as a ground of negligence, except as bearing upon defendant's negligent failure to give adequate signals.

Same. Where excessive speed is made a ground of negligence in approaching a highway crossing and the evidence supports the issue, an instruction confining the jury's consideration to defendant's alleged negligence in failing to give adequate signals is erroneous.

Same: CONTRIBUTORY NEGLIGENCE. An instruction requiring plaintiff in a personal injury action, as a condition precedent to recovery, to show himself absolutely free from all negligence is erroneous, because requiring too great a degree of care on his part.

Same: DUTY TO STOP, LOOK AND LISTEN: DEGREE OF CARE REQUIRED.
The rule requiring one approaching a railway crossing to stop, look and listen for an approaching train exacts of him reasonable care in so doing; and an instruction that it was plaintiff's duty to use ordinary care under all the circumstances to stop, look and listen at such reasonable places as would best enable him to discover an approaching train was erroneous, because requiring of him an exercise of the highest degree of care in selecting the best places for observation, instead of ordinary care. And an instruction that if plaintiff could have seen the train in time to have avoided the accident by an exercise of ordinary care, and did not do so, was erroneous; as plaintiff was not necessarily negligent because the danger might have been seen and avoided.

Same: LAST CLEAR CHANCE: INSTRUCTION. It is not essential to an application of the doctrine of the last clear chance that plaintiff's negligence should have ceased before the accident, in order to recover under that doctrine: So that even though the plaintiff, in a personal injury action, was negligent in putting himself in a place of danger and in remaining there down to the very time of the accident, still, if the defendant knew of plaintiff's danger in time to have avoided the injury by exercising reasonable care, it would be liable for failure to exercise such care under the doctrine of the last clear chance. The instruction in this case fails to correctly state the rule.

Same: EVIDENCE. Under the evidence in this action for injury at a railway crossing it is held, that the question of whether defendant might not have prevented the accident was for the jury, although

plaintiff's negligence in going upon the crossing continued up to the very time of the accident.

Railways: CROSSINGS: CONTRIBUTORY NEGLIGENCE. If a traveler approaching a railway crossing sees a train at such distance that he believes he can safely cross in the exercise of ordinary care, he is not negligent in attempting to cross, although unable to pass over the track before he is struck by the train.

Same. One who is confronted with a sudden peril is not necessarily negligent in taking the more dangerous of two or more avenues of escape.

Evans, C. J., dissenting in part.

*Appeal from Mitchell District Court.—Hon. J. F. CLYDE,
Judge.*

MONDAY, DECEMBER 20, 1909.

REHEARING DENIED, TUESDAY, APRIL 12, 1910.

ACTION at law to recover damages for injuries received by plaintiff in a collision with one of defendant's trains at a public highway crossing in the town of Toeterville, in Mitchell County. The case was tried to a jury, resulting in a verdict and judgment for the defendant, and plaintiff appeals.—*Reversed and remanded.*

Charles E. Salisbury, William H. Salisbury, and Miles K. Culver, for appellant.

*Kenyon, Kelleher & O'Conner and Ellis & Ellis,
for appellee.*

DEEMER, J.—That plaintiff received the injuries of which he complains by reason of being struck by a train on defendant's line of road, at a public highway crossing at the town of Toeterville, is conceded. But defendant denies any negligence on its part, and claims that plaintiff was

guilty of negligence contributing to his injury, and that he can not recover. That there was enough testimony to take the question of defendant's negligence to the jury is practically conceded; but it is contended that, as a matter of law, plaintiff was guilty of contributory negligence, and that, no matter what the errors of the trial court, the judgment should be affirmed on that ground. Plaintiff's counsel have exhausted the alphabet in arguing errors, and in addition thereto have used so many numerals that we have not attempted to count them. At the conclusion of their argument they summarize these alleged errors under thirty-seven different heads, and we shall not go beyond this summary in trying to formulate an opinion which will settle the material and controlling points in the case. In view of the conclusion reached it will not be necessary to pass upon many of the propositions argued.

Defendant's railway runs east and west through the town of Toeterville, and there were two switches in the village, known as the east and west switches. A public highway running north and south crosses the right of way. The west switch is something like eight hundred and ninety-two feet from the point where the highway crosses the main line, and the east switch is about three hundred and seventy-two feet distant therefrom. There are stockyards near the west switch something like five hundred and thirty-four feet from the highway crossing. Westward of the highway crossing about three hundred and thirty-eight feet are some coal sheds, and also an elevator about two hundred feet west of the crossing. These buildings and yards are all north of the railroad track and west of the highway crossing. The railway depot is south of the track, and about fifty-seven feet west of the crossing. At the highway crossing there are two tracks, one known as the main line, and the other as the passing track, and the distance between the inside rails of these tracks is something like eight feet and ten inches. At the time of the accident

in question there were some box cars on the passing track extending from the elevator to the stockyards, although as to this there is some dispute in the testimony.

There is an angling road, which leads from the stockyards in a gentle curve along north of the elevator and north of the passing track, and gradually nearing said passing track, and at the point where the highway crosses the passing track joins with this highway and crosses the passing track and the main track. This angling road is the road used by persons having business at the stockyards, who afterwards drive over into the village of Toeterville to make purchases and transact business. The main part of the village of Toeterville is south of the railroad tracks; the only business conducted north of the track being the stockyard business and the lumber yard business. The lumber yards are situated to the east of the north and south highway, a few feet north of the passing track, and being a few feet from the highway. The lumber in the yards was not in sheds on December 1, 1906, but was put in piles north of the lumber office, and had lanes running east and west. These piles were in places high. There is a whistle post west from the center of the public highway, and the distance of the whistle post from the place where the appellant was injured in the center of said highway is two thousand seven hundred and ninety-three feet nine inches.

Plaintiff is a young farmer thirty-four years of age, and "on December 1, 1906, at from about two o'clock to two thirty o'clock p. m., he and his father started to take a load of hogs to Toeterville. The roads were rather rough, and they drove slowly. Appellant and his father, after reaching Toeterville, drove to the stockyards, unloaded the hogs, and weighed them. They then drove slowly from the stockyards on the angling road leading by the north side of the elevator and inclining gently toward the passing track, with the intention of passing over the tracks by way of the public highway and going over into the main part of the village of Toeterville to transact business. There was a train due at the station, coming

from the west at two thirty-four p. m., but the testimony shows that it was late, some of it indicating that it did not arrive there on the day in question until after three o'clock. The testimony also shows that this train went to the little town of Stacyville, where it was turned around and immediately brought back from the east over the same track. The time taken to go to Stacyville and back was about half an hour. Appellant, with his father by his side seated in a broad-tired lumber wagon, with a hog rack on, and driving a pair of horses, one of which was eighteen and the other twelve years of age, proceeded toward the place where the angling road joins with the highway where it crosses the railroad in the village of Toeterville. According to plaintiff's testimony, when the horses approached the side track or passing track north of the main track, and just before the side track was reached, he looked west along the track to note whether there was a train coming. This glance was in the direction of the elevator. . . . When the appellant looked west toward the elevator to note whether there was a train coming, he said he could see none. His team at this time was, as he says, about up to or just going on the side track. He said: 'I didn't see anything, so I looked to the east, because I had an idea that if there was a train coming it would be from Stacyville.' Quoting now from his testimony: "I knew about the time trains were due from Stacyville—about three six in the afternoon. My opinion is that this time when I looked must have been about three o'clock. In coming up to the track I listened to know whether there was any signal or anything of the kind. I didn't hear any." Witness further says:

I heard a short whistle, and looked back. This was when my horses were stamping the main track. I think they were just with the front feet on the main track. I was sitting on the right side of the wagon and wore a hat which the wind kind of flapped over my face on the side

toward the elevator. The wind was blowing south. When I heard those sharp whistles, I hollered to my team to jump, but they didn't, so I swung them off to the left. The train came so fast that I couldn't get them off in time. The engine caught the right horse under the front legs and threw her up, and that swung the wagon, and the tender caught the wagon on the hind part and smashed that up, and the next thing I knew I had been falling down. As near as I can say I fell down beside the last coach, and when I was lying there the last coach was by. I was lying right on my back, and lifted up my leg and saw my foot was cut off. After I heard that whistle, I looked toward the engine. That was the first I had seen or heard of the train. They were coming pretty fast. If they didn't come so fast I pretty sure I got off the track. The last coach and last truck must have cut my leg off. The train had gone quite a ways before it stopped after it had hit me.

Other witnesses corroborated plaintiff to some extent:

The train which struck him was made up as follows: Engine, mail car, baggage car, smoking car, and ladies car, four coaches, and the tender and engine. The engine weighs about forty tons, and the cars about twenty tons apiece. The train was equipped with the Westinghouse air brake system, and had the quick action triple valve. The train was equipped with four-wheeled trucks, there being two under each coach, making eight wheels under each coach, and there was a brake bearing on each wheel. There were four bearing places for brakes on the engine, and there were eight wheels with a brake to each wheel on the tender. The length of the engine and tender was sixty feet. The length of each coach on the train was between fifty and sixty feet. The engineer and fireman both agree that the train was proceeding at a speed of about thirty or thirty-five miles per hour. Other witnesses claim that the train did not slacken before it hit the appellant. When the train hit the appellant, the horses and wagon were thrown some distance. One witness says one horse was thrown from six to eight rods. It is shown that the train whistled once for the crossing when out at the whistling post, which was two thousand seven hundred and ninety-

three feet nine inches away from the crossing. No other whistle was given until the emergency whistle was sounded, which was somewhere between two hundred and fifty and five hundred feet from the crossing. The engineer and the fireman testify that the bell was ringing. The witnesses of the appellant testify that the bell was not ringing, and that, though in a position to hear it, they did not hear it. The employees of the appellee claim that they made every effort to stop the train after it became evident to them that the appellant could not or would not get off the track. Claim is made by these employees that they first saw the appellant as they approached the elevator. German, the fireman, said: 'As we approached the elevator, I saw the team approaching the side track from the north, and warned the engineer. About the same time he noticed it himself, and grabbed the whistle rope.' Witness further stated: 'I first saw Will Bruggeman on that crossing that day when the team was approaching the side track. I could see Mr. Bruggeman from where he was at the time when I first saw the team.' 'I could see him, and the team, too, from the very first. I was looking straight ahead to the east down the track, and my attention was not attracted to this team until they had started, just before they got onto the side track, perhaps five or six feet before they reached the side track. Then my attention was called, and I warned the engineer. I was very near the east side of the elevator. The whole rig was visible.' The engineer stated: 'When the engine got opposite the elevator, I observed this team coming upon the side track north of the main track. I immediately grabbed the whistle, and gave several sharp blasts of the whistle. I jerked the rope successively—short blasts. I should say a second between each jerk or pull of the rope would be necessary in order to give sharp blasts of the whistle, and not give one continuous blast. The fact is, it is necessary to give a second between each jerk to make a clear, short blast, or about that. I whistled for the town just as we left the whistle post.' In answering the question, 'How many blasts of the whistle did you give?' he said, 'One long blast.'

The testimony as to the space within which the

train could have been stopped is conflicting; some of the witnesses said in from two hundred and forty to two hundred and fifty feet, and others that it could not be stopped short of four hundred and fifty to five hundred feet. With this testimony before us we now go to some of the errors complained of.

The negligence charged in the petition was (1) excessive speed of the train; (2) failure to sound the whistle and ring the bell as the train went through the town; (3) failure to sound the whistle and ring the bell as required by law before approaching the crossing, where plaintiff was injured; (4) the leaving of cars upon the side track in such a manner as to obstruct plaintiff's view of the train when approaching the highway crossing; and, (5) seeing plaintiff upon the track and in a position of peril in time to have saved him, the engineer in charge of the train failed to check or take the usual precautions to avoid injuring him.

Many complaints are made of the conduct of the court and of opposing counsel, and an argument of nearly twenty printed pages is devoted to these matters. We shall not take up these complaints in detail. It is sufficient to say the trial was not conducted with that decorum which should have been observed. Many things were said and done by counsel on either side which should not have been permitted, and it seems that the patience of the trial court was severely taxed. Remarks were made by counsel which necessarily called for a rebuke from the court, and it is doubtless true that, as viewed from the cold printed page, the court went to the very verge of propriety in some of its remarks. They were induced, however, by the conduct of counsel toward each other and toward the court, and we shall not reverse for that ground. Upon a retrial of the cause it will be well for counsel on either side to more closely observe the rules which should always govern their

conduct, even in the trial of a protracted and vigorously contested law suit.

Whilst many questions are presented with reference to rulings on testimony, we shall consider but three or four. The engineer of the train was a witness for the defendant,

and questions were propounded to him which
1. EVIDENCE:
invasion of
province
of jury.
were objected to as shown. Rulings of the court are also given, as well as the answers of

the witness: "Q. Taking this train as you was operating that day, applied and constructed as it was, on the track at Toeterville, where you were then running and operating this train, could you have stopped this train by any possibility in any shorter distance than the train was in fact stopped? (Plaintiff objects as calling for a conclusion of the witness. Objection overruled. Plaintiff excepts.) A. No, sir; I could not. Q. Could it have been stopped by any human agency in any quicker time on that particular day than it was stopped then? (Plaintiff objects as calling for a conclusion.) Q. In your opinion? (Objection overruled. Plaintiff excepts.) A. No, sir." As these questions called for the very matters which the jury was to determine, rather than answers to hypothetical questions, or as to the time in which such a train might have been stopped, the court was in error in overruling the objections. This is squarely held in *Nosler v. Railroad*, 73 Iowa, 268. See, also, as sustaining the same proposition, 8 Ency. of Pleading & Practice, 751, and cases cited, including the following from Iowa: *Whitsett v. Ry. Co.*, 67 Iowa, 150; *Kitteringham v. Ry. Co.*, 62 Iowa, 285; *Smith v. Hickenbottom*, 57 Iowa, 733; *Allen v. Ry. Co.*, 57 Iowa, 623; *Muldowney v. Ry. Co.*, 39 Iowa, 622; *State v. Felter*, 25 Iowa, 67. The distinction between questions which do not usurp the functions of the jury and those which do is pointed out in *Sachra v. Town of Manilla*, 120 Iowa, 562.

II. Plaintiff introduced in evidence certain printed

books on air brakes and air brake proceedings, purporting to give the distance in which trains moving at different

2. **EVIDENCE: admissibility of documentary evidence.** rates of speed could be stopped. These were based upon facts given under conditions not

stated, or, if stated, were not shown to be similar to those existing at or near the place where the collision occurred in the instant case. For many reasons these books were not admissible in evidence. In the first place they did not relate to any of the exact sciences; again the conditions under which the tests were made are not shown; and, lastly, the matter was, in any event, within the sound discretion of the trial court. *Bixby v. R. R. Co.*, 105 Iowa, 293; *Etzkorn v. Oelwein*, 142 Iowa, 107; *Kimball v. Electric Co.*, 141 Iowa, 632.

III. Plaintiff called an engineer, who was qualified as an expert, and propounded to him the following question:

"Q. Mr. Kerney, I call your attention to that Toeterville

3. **EVIDENCE: hypothetical questions; prejudicial remarks of court.** track. Suppose the day was clear; the track was dry; there was a little dust in the air, and the wind was blowing either from the

southeast or southwest, and suppose that a train consisting of a forty-ton engine and four coaches, each weighing about twenty tons, baggage and tender and all, equipped with the Westinghouse brakes, with the quick action triple—suppose that train was proceeding at from twenty-five to twenty-six miles per hour, and suppose that an obstruction was discovered on the highway where it crosses the railroad track, at a distance varying from two hundred and two to two hundred and sixty-eight feet, could that train be stopped before it reached that crossing by application of the brakes with which the train was equipped as stated?" Defendant objected to the competency of the witness, and also upon the ground that it embodied matter not shown by the record. The trial court then made following record: "Court: In what respect do you claim, Mr. Ellis, that the hypothesis is incorrect or

not sustained by the record? Mr. Ellis: I claim that there is no evidence here as to when this party was discovered by the engineer upon the train. The basis on which this question is asked formulates a certain number of feet, which is not shown to be correct, and there is nothing to show that it became in any way the duty of the engineer to stop the train at the place designated in this question. Court: Well, I think this objection should be sustained, particularly on two grounds: First, that it is not yet shown that this witness has ever handled a train substantially like this; and second, the hypothesis assumes that the party was seen on the track at a distance from two hundred and two to two hundred and sixty feet. The evidence does not show that fact. Under the testimony here he wasn't on the main track at that time. Mr. W. H. Salisbury: Your honor, the witness' horses were upon the track by the evidence when the emergency whistle was sounded. Mr. Ellis: There is no such evidence. Court: The court does not remember the testimony. Plaintiff excepts." There was sufficient testimony in the record to justify the hypothetical question, and the trial court was in error in making the ruling, and more especially in remarking before the jury that the testimony did not show certain of the assumed facts. *State v. Philpot*, 97 Iowa, 365; *Russ v. Steamboat*, 9 Iowa, 374; *In re Knox Will*, 123 Iowa, 24; *Shakman v. Potter*, 98 Iowa, 61; *Coldren v. Le Gore*, 118 Iowa, 212. These are all the rulings on evidence which we shall consider, as other objections are either without merit, or the matter will not arise upon another trial.

IV. Coming now to the instructions, it may be said in general that they are not as clear as they should have been in presenting the exact issues to the jury. Plaintiff was relying, not only upon defendant's failure to give the statutory signals for a highway crossing, but also upon the engineer's failure to give any kind of a warning signal

in approaching the crossing in question, in view of the condition of affairs with reference to buildings, stock yards, lumber yards, etc., as shown by the record. The trial court submitted this instruction. ^{4. RAILWAYS: crossing accident: signals: negligence:} with reference to signals: "1. That reasonable and adequate signals were not given of the approach of the train to the crossing in question"—and then said: "Other allegations made by plaintiff are withdrawn by the court, and need not be considered by you." It will be observed that nothing is said here about statutory signals. This instruction was followed by one numbered 4, reading as follows:

In the matter of signals our statute provides that 'the whistle shall be twice sharply sounded at least sixty rods before a road crossing is reached and after the sounding of the whistle the bell shall be rung continuously until the crossing is passed.' Our Supreme Court have held that a failure to give these statutory signals would constitute negligence, but that if the crossing approached was more than usually dangerous because of curves or cuts or obstructions, more than the statutory signals might be found by the jury to be necessary for reasonable and adequate warning of the approach of the train to the crossing. It was the duty of the defendant's employees in charge of the train in question to give reasonable and adequate warning of the approach of the train to the crossing, to be determined by the jury from the dangers to be reasonably apprehended at the crossing. If defendant's employees did not use ordinary care to give reasonable and adequate warning of the approach of the train to the crossing in question, as herein stated, then they were negligent in that respect. If they used ordinary care in giving such warning, they were not negligent in that respect. Care, to be reasonable, must be in proportion to the danger to be apprehended. On this issue the defendant's employees had the right to assume that all persons approaching or attempting to cross the crossing would exercise reasonable and ordinary caution for their own safety, bearing in mind the dangers to be apprehended at the crossing.

Taking these instructions together, it is very difficult to say whether or not the jury was permitted to consider defendant's failure to give the statutory signals as evidence of negligence. It is provided by section 2072 of the Code: "A bell and a steam whistle shall be placed on each locomotive engine operated on any railway, which whistle shall be twice sharply sounded at least sixty rods before a road crossing is reached, and after the sounding of the whistle the bell shall be rung continuously until the crossing is passed; but at street crossings within the limits of cities or towns the sounding of the whistle may be omitted, unless required by ordinance or resolution of the council thereof; and the company shall be liable for all damages which shall be sustained by any person by reason of such neglect. . . ." As Toeterville is neither a city nor town, but a mere village, this section seems to be applicable to the case, and the court should have so instructed the jury, and not left it so uncertain as it did. *Potter v. R. R. Co.*, 46 Iowa, 399; *McGuire v. R. R. Co.*, 138 Iowa, 664.

V. In its fifth instruction the court said: "Our statute does not fix any limit to the speed at which trains shall be run, even at highway crossings. In this case the speed at which the train in question was run at the crossing or approaching thereto—whether of speed: in struction. great or little—would not of itself constitute negligence, but you have the right to consider that speed in deciding whether or not reasonable and adequate signals were given, together with all the proven facts bearing on that issue." This evidently presented but one side of the question. Indeed, if the jury followed it, they were obliged to find, under the facts of the case as disclosed by the testimony, that the speed of the train could not be considered as showing negligence on the part of the defendant, save as it had bearing only upon the question of defendant's neglect to give reasonable and adequate signals.

We have recently had occasion to consider the question of speed in *Hartman v. R. R. Co.*, 132 Iowa, 582, and we there said: "The plaintiff also alleges negligence in the speed of the train at the time of the collision. As has often been said, no rate of speed in a train moving in the open country is in itself negligence as to a person upon a crossing, but it sometimes happens, when considered with reference to the circumstances of the particular place, that the rate of speed may be an important factor in determining whether due care has been exercised. Whether, in view of the location of this particular crossing at the end of a deep cut, the obstruction, if any, to the view of the approaching traveler, the failure to sound signals of warning, and other attendant circumstances, the rate of speed in this instance had any tendency to indicate a want of reasonable care on the part of the defendant was a question of fact, and not of law." See, also, to the same effect, *Kinyon v. R. R. Co.*, 118 Iowa, 349; *Hart v. R. R. Co.*, 109 Iowa, 631.

VI. Instruction No. 6 read as in this wise: "If defendant permitted box cars to remain on the side track anywhere near the crossing in question, that would not con-

6. ~~SAME~~ stitute negligence; but, if cars were upon

the side track near the crossing so as to obstruct the view of the track from the highway, that fact may be considered by you in deciding whether or not reasonable and adequate signals were given, and also in deciding whether or not the plaintiff used due care in approaching the crossing just before the accident." This instruction was also erroneous, as we view it, in that it confined the jury to a consideration of defendant's failure to give signals, whereas it should have covered other matters of negligence charged; as, for instance, the speed of the train. As sustaining this view, see *Artz v. R. R. Co.*, 44 Iowa, 288; *Reed v. R. R. Co.*, 74 Iowa, 188.

VII. A part of instruction No. 8 reads as follows:

"If you find from the evidence under previous instructions that defendant's employees in charge of the train in question were negligent in any or all the respects
7. SAME: contributory negligence. named in the first instruction, and that such negligence was the direct and proximate and natural cause of the plaintiff's injuries complained of, then your verdict should be for the plaintiff in some amount, unless plaintiff has failed to establish the fact that he was free from all negligence on his part that caused, or in any manner contributed to, his injuries, as explained later on in these instructions." It will be noticed that by this instruction plaintiff was compelled to negative all negligence on his part. True, the instruction also says "as explained later on in these instructions." That plaintiff is not required to negative all negligence on his part is so well established by the authorities that we need do no more than cite them. See *Jerolman v. R. R. Co.*, 108 Iowa, 177; *Reitveld v. R. R. Co.*, 129 Iowa, 249; *Camp v. R. R. Co.*, 124 Iowa, 238. No subsequent instruction was given which cured this error, even if it could have been so cured.

VIII. This same error was repeated in the ninth instruction, and in this latter instruction the court also said: "In approaching the crossing in question plaintiff was required to be vigilant in the use of his senses,
8. SAME: duty to stop, look and listen: degree of care required. bearing in mind the dangers to be apprehended, and to use ordinary care under all the circumstances to look and listen, or to stop and look and listen, at such reasonable place or places as you may believe would best enable him to discover an approaching train and to promote his own safety. If you find from the evidence that plaintiff could have seen the approaching train by looking in the direction of its approach before he reached the crossing, and in time to have avoided the collision by ordinary care, and omitted to do so, such omission was negligence on his part; and, if it

caused or in any manner contributed to plaintiff's injury, then he can not recover, and your verdict should be for the defendant." These two sentences are also erroneous. Plaintiff's conduct was not to be judged from a finding of the jury after the accident that he did not stop to look and listen at the best place or places to discover the train. This would call for the very highest degree of care on his part, whereas nothing but ordinary care was required of him. *Schulte v. R. R. Co.*, 114 Iowa, 94. Moreover, in the second paragraph the jury is told that, if plaintiff could have seen the train in time to have avoided the accident, and did not then exercise ordinary care, he could not recover. This, too, is erroneous. *Baldwin v. R. R. Co.*, 63 Iowa, 210. In the latter case it was said: "The plaintiff can not be deemed to have been necessarily guilty of contributory negligence if the danger might have been seen, and avoided if seen." See, also, *Artz v. R. R. Co.*, *supra*; *Christiansen v. R. R. Co.*, 140 Iowa, 345.

IX. The latter part of instruction 9 reads as follows: "In order to recover herein it is the law that the burden of proof on this issue is on the plaintiff, and to recover he

9. SAME: last
clear chance:
instruction. must show that he himself was free from all negligence that caused or in any manner contributed to his injury. And this is true even

though the defendant's employees are shown to have been negligent, and their negligence also contributed to the injury. The law will not permit a recovery on the ground of negligence whenever the injury is the result of the negligence of both parties at the same instant of time. If plaintiff has failed to show by a preponderance of the evidence that he was free from negligence contributing to his injury, your verdict should be for the defendant, unless plaintiff has made a case under the claim of 'last clear chance,' as stated in the next instruction." This was followed by the tenth instruction, reading: "If the engineer exercised ordinary care and diligence to prevent a collision

after he saw the plaintiff in a position of peril, or it was evident he was going into a place of peril then plaintiff can not recover on this claim of 'last clear chance.' If the defendant did not use ordinary care and diligence to prevent a collision, as herein stated, such failure would be negligence on his part, and, if it caused the accident in question, and the plaintiff was free from negligence at the instant of the collision, as herein stated, such failure would be negligence on his part, and, if it caused the accident in question, and the plaintiff was free from negligence at the instant of the collision, even though he had been negligent at some time before that instant, then and in such case the plaintiff may recover on this claim; but, if the plaintiff himself was negligent at the very instant of the collision and such negligence in any manner contributed to his injury, then and in such case the plaintiff can not recover under this claim. The rule of 'last clear chance' does not apply to the case of a plaintiff who was himself negligent at the very instant of the injury for which he sues, if such negligence in any manner contributes to his injury."

The trial court seems to have been laboring under a misapprehension of the doctrine of "last clear chance," as it has been called. It is not true that a plaintiff can not rely upon the doctrine if his negligence continued down to the very instant of the collision. This may be true in some cases, of course; but it is by no means an universal rule. The rule for this state, as applied to the facts which a jury might have found, is this: In the application of that doctrine it is not necessary to find that the negligence of the plaintiff had ceased to operate before the accident occurred, and that, if it had ceased to operate, the defendant with knowledge of plaintiff's danger due to his own negligence, had failed to take reasonable precautions to avoid injury to him. It was enough to call for the application of that doctrine that the defendant's employees

knew of plaintiff's danger in time to have avoided injury to him in the exercise of reasonable care, even though he was negligent in putting himself in a place of danger, and continued to be negligent in not looking out for his own safety. *Barry v. R. R. Co.*, 119 Iowa, 62; *Doherty v. R. R. Co.*, 137 Iowa, 358; *Purcell v. R. R. Co.*, 109 Iowa, 629; *Kelly v. R. R. Co.*, 118 Iowa, 390. There is general agreement in the authorities that, where an engineer actually sees a person in a position of danger, and then fails to do what he reasonably can to prevent an accident, the railroad company is held responsible for the resulting injury, irrespective of the question of contributory negligence. If just before that climax only one party had the power to prevent the catastrophe, and he neglected to use it, the legal responsibility is his alone. If, however, each had such power, and each neglected to use it, then their negligence was concurrent, and neither can recover against the other.

The trial court evidently had in mind the rule which applies when neither party discovers the other and the negligence is concurrent, or to a case where one has no bet-

ter opportunity than the other to anticipate evidence. the accident, or any better means of preventing it than the other. But there was enough testimony in this case to take the question to the jury as to whether or not the defendant might not have prevented the injury, although the plaintiff was negligent down to the very time of the collision. It is one thing to hold that the continuing negligence of a plaintiff will prevent a recovery for a negligent omission of defendant to discover his peril, and quite another to hold that plaintiff's continuing negligence will prevent a recovery for the negligence of the defendant in failing to take proper care to avert the accident after the plaintiff's danger had been discovered and ought to have been appreciated. If each party is negligent in failing to discover the danger, then the negligence is ordin-

arily concurring, and the doctrine of last fair chance does not apply. But if defendant discovered plaintiff's negligence and his peril in time to have avoided the injury, and did not take the necessary means to do so, then the doctrine does apply in full force; for in such cases the defendant has the last opportunity of avoiding the collision. This thought was not presented to the jury by the instructions given. Indeed that view of the case was distinctly withdrawn. In this there was manifest error.

X. Instruction No. 11, given by the trial court reads: "If you believe from the evidence that at some time before the plaintiff reached a place of actual peril, and when by

11. RAILWAYS:
crossings:
contributory
negligence.
the exercise of ordinary care he might have avoided a collision by stopping his team or turning it aside after the danger signal was

sounded and was heard by him, and he then saw the approaching train, it was his duty to stop the team or turn it aside, and the engineer had the right to assume that he would heed the signal and avoid the danger of a collision, and to act upon his assumption until such time as it was made evident to him that plaintiff was about to go into a place of peril in spite of the warning. If you find from the evidence that the facts were as stated in this instruction, then it was negligence for the plaintiff to go forward, and if he did so, and was injured as a consequence, he can not recover herein, and your verdict should be for the defendant." It is somewhat difficult to understand just what this instruction means. From one point of view it is clearly erroneous, as said by this court in *Adams v. R. R. Co.*, 138 Iowa, 487. "If a traveler observes a car at such a distance that in the exercise of ordinary prudence he believes he can safely cross, and in undertaking to do so a collision occurs, this can not be attributed to negligence on his part"—citing *Patterson v. Townsend*, 91 Iowa, 725; *Ward v. Marshalltown Co.*, 132 Iowa, 579. See, also, as supporting this proposition,

Powers v. Railway, 143 Iowa, 427. See page 434, where we said: "If, under the circumstances as they reasonably appeared to him, plaintiff was justified in thinking that he could cross the track in safety, and he was in fact injured by reason of the improper speed at which the car was operated, his right to recover is not conclusively negatived by proof that, if he had looked just before coming into the immediate proximity of the track, he might have discovered his danger and avoided it." Moreover, the instruction tells the jury that, if plaintiff might at some time before he reached a place of peril have avoided the peril by stopping his team, or otherwise, then he was guilty of negligence. That this was error see *Winey v. Railroad*, 92 Iowa, 622; *Mackerall v. Railroad*, 111 Iowa, 547; *Meyer v. Railroad*, 134 Iowa, 722; *Hartman v. Railroad*, 132 Iowa, 584.

Again, from another view, the instruction is erroneous in that it failed to state a well-understood principle of law that, when one is confronted with a sudden peril,

it is not necessarily negligence on his part if
^{12. SAME.} he takes the more dangerous of two or more means of escape. That this is a fundamental rule see *Pierson v. R. R. Co.*, 127 Iowa, 13; *Cummings v. R. R. Co.*, 114 Iowa, 85, and cases cited.

For the many errors pointed out there must be a reversal of the judgment. It must not be assumed from this reversal, however, that we believe plaintiff was free from contributory negligence. That was, as we believe, a fair question for the jury under proper instructions. With proper instructions a jury might find that plaintiff was negligent, but it is not our province to do so. The parties are entitled to the verdict of a jury upon this question under proper directions from the trial court. Neither should it be inferred that we think a verdict should be returned for plaintiff under the rule of the "last clear chance." That, too, we regard as a jury question, more doubtful,

perhaps, than the first question of fact. These observations are made because of defendant's insistence that, no matter what errors the trial court may have made, the judgment should not be reversed, because upon the whole record there should have been a verdict and judgment for it. We think there was enough testimony to take the case to the jury on both propositions, and that plaintiff is entitled to the judgment of a jury upon proper instructions.

Appellee's counsel suggest that the record is not in such shape that we may consider the propositions discussed, or any others; but with this we can not agree. Proper exceptions were saved to the instructions reviewed, and all other points discussed were properly preserved of record and presented to us in the briefs. These latter were made more prolix and extended than they should have been, but here again counsel are equally in fault.

The result is that the judgment must be and it is reversed, and the cause remanded for a retrial.—*Reversed and remanded.*

EVANS, C. J. (dissenting in part).—I do not dissent from the final word of the majority opinion, but there is much of such opinion in which I can not concur. I only care to specify and discuss the seventh, ninth, and tenth divisions of such opinion.

I will pass the seventh division for last consideration, and will consider first the ninth division of such opinion. This involves a discussion of the doctrine of the "last clear chance." Our previous decisions are not wholly consistent in their discussion of this doctrine. Special attention was given to this subject in the recent case of *Bourrett v. R. R. Co.* (Iowa) 121 N. W. 380. The pronouncement made in the present majority opinion is quite inconsistent with the holding of the majority opinion in the *Bourrett* case, and creates further complication in our holdings on

that subject. Briefly stated, the holding of the majority opinion in the *Bourrett* case was that the doctrine of last clear chance involves the question, not of comparative negligence, but of proximate cause. The theory of the application of the doctrine is, as there set forth, that the *subsequent* negligence of the defendant became the proximate cause of the injury, and that the previous negligence of the plaintiff was therefore not a *contributing* agency. Such negligence of the defendant is sometimes designated as "negligence after negligence," or "subsequent negligence." If the previous negligence of the plaintiff is no part of the proximate cause, then it is not *contributory*, and it is an inaccuracy of speech to call such negligence "contributory negligence." This is the substance of the holding in the *Bourrett* case. The analysis worked out in that case was that the liability of the defendant arose under this doctrine by reason of its negligence after the previous negligence of the plaintiff had ceased to operate, and because such previous negligence could not be deemed a part of the proximate cause. If this is a correct analysis, then it can not be said that a plaintiff may recover under this doctrine, even though his *contributory* negligence existed up to the moment of the accident, because if such negligence was no part of the proximate cause, it could not be *contributory*.

The position taken by the majority opinion at this point is a substantial quotation from the case of *Powers v. R. R. Co.*, 115 N. W. 496 (Iowa). It is overlooked, however, that a rehearing was granted in that case, and that a subsequent opinion was filed therein which entirely abandoned the position upon which the majority opinion now rests. See 143 Iowa, 427. In the subsequent opinion it was held that the doctrine of "last clear chance" had no application to the case. I quote the third division of such opinion, which is as follows: "The motion for new trial also raised the question whether there was not such evidence in the record as to require an instruction to the jury, as to the

doctrine of the last fair chance. Under the rule announced in the recent case of *Bourrett v. Chicago & Northwestern Railroad Company* (Iowa) 121 N. W. 380, the plaintiff was not entitled to a submission of the question of defendant's liability on the principle that defendant's employee should have discovered, and might have averted, the injury to plaintiff, notwithstanding plaintiff's contributory negligence, if the contributory negligence of the plaintiff continued up to the very moment of his injury. Without elaboration, it is sufficient to say that, under the record as presented, the court was not bound to submit to the jury the question of defendant's liability under the doctrine of the last fair chance. What has been said in the case just cited sufficiently indicates the views of the court as applied to the case before us. The duty of the defendant's employee to avoid the injury to the plaintiff approaching its track was not greater than the duty of the plaintiff to avoid injury from the approaching car, and these duties were concurrent and continuous up to the moment of the accident. If it should be found by the jury that plaintiff was guilty of contributory negligence in failing to look out for the approaching car before he stepped upon the track, then the defendant could not be held liable for negligence of its employee in failing to avoid injury to plaintiff at that time."

I find nothing in the cases cited in the majority opinion which would justify us in holding that the tenth instruction of the trial court was erroneous. The *Purcell* case, 109 Iowa, 628, was a case where the injured party had by his own negligence ventured upon a bridge. When his danger became imminent, and apparent to the engineer, he was helpless to save himself, except by jumping from the bridge. Such a situation is covered fully by our holding in the *Bourrett* case. The negligence of the engineer arose after the negligence of the injured party had spent itself. The *Kelly* case (118 Iowa, 390), was one where

the injured party was a section hand, and was engaged in driving spikes upon the track. The morning was cold, and his cap was pulled down over his ears. He was not aware of the approach of the train, and the evidence tended to show that this fact was known to the engineer in time to have protected him. It was held that his failure to discover his danger would not necessarily defeat him. Whether in this class of cases the liability of the defendant should be predicated upon the doctrine of last clear chance, or upon the theory of willful or wanton injury, is one of the questions upon which there is much diversity of opinion in the authorities. In the *Kelly* case this court did not in terms specify the theory upon which the liability was sustained. The opinion in the case recognizes a distinction between the case then under consideration, where the injured party was already in the place of danger, when discovered, and that class of cases where the injured party was not in a place of danger when observed by the trainmen, but negligently proceeded into the danger zone at such time and place when it was too late for the trainmen to protect him. In the latter class of cases it is usually held that the trainmen are not ordinarily bound to anticipate that such a person will proceed into the danger zone and the duty of the trainmen to stop a train does not arise until the peril of such person is apparent or imminent. In such a case trainmen are not required to stop their train by the mere fact that they may see persons near the track outside the zone of danger, even though they be approaching such zone of danger. In the case at bar the plaintiff was driving toward the crossing. The front feet of his horses had but just reached the main track as the train came upon him. He turned them to one side, and the side of the passing train brushed down horses and wagon. It is manifest, therefore, that he had been in the danger zone for only a moment before the collision.

The *Doherty* case, 137 Iowa, 358, does not support

the majority opinion. It was there held that the doctrine of last fair chance had no application to the case, and the judgment below was reversed on that ground. I quote from the opinion as follows: "In this situation of the evidence there was no room for application of the doctrine of the last fair chance. That doctrine can have application only in the cases where it is made to appear that the negligence of the defendant culminating in the accident arose after the discovery of the position of danger in which plaintiff, by his own negligence, had placed himself. This is upon the theory that under such circumstances the negligence of defendant, and not the prior act of negligence of plaintiff, must be regarded as the proximate cause of the accident. . . . It is no doubt true, by the great weight of authority, that in the case of steam railways operated over private ways there can be no recovery for injuries sustained by one negligently exposing himself to danger, except on proof that, after being actually discovered, the railway employees might have stopped the train, and negligently failed to do so. As the proposition is put in some of the cases, the injury inflicted, to be recoverable for, must appear to have been wanton in the sense that the person in charge of the train, after being made aware of the danger, and having the means at hand by the use of which he might have prevented the accident, negligently failed to adopt or make use of such means. But in this state, as in many of the other states, the rule applicable in steam railway cases is departed from when dealing with accidents arising out of street railway operation, to the extent, at least, of holding that proof of actual knowledge of the position of danger of the party who suffers injury is not in all cases required." The case above quoted from was a street railway case.

The *Barry* case, 119 Iowa, 62, was also a street railway case. It was held that there was evidence tending to show that the motorman did see the deceased in the place

of danger in time to have avoided his injury. Turning to the case at bar, it is very doubtful in my mind that the plaintiff was entitled to an instruction at all on the doctrine of last clear chance. Assuming that the engineer saw him for some distance before the engine reached the crossing, he was not in a place of danger at that time. He was approaching the crossing, it is true. So was the train. I find nothing in the evidence to charge the engineer with knowledge that the plaintiff would undertake to cross the track in front of the train until he drove his team into the danger zone. Up to this time at least, the engineer had the right to presume that the plaintiff would stop and give the train the right of way over the crossing. The plaintiff can invoke the doctrine of last clear chance only upon the theory that, after his intention to cross the track ahead of the train became apparent to the engineer, such engineer, in the exercise of ordinary care, could have stopped his train. In view of the new trial to be had I will not discuss that question of fact. Assuming that the plaintiff was entitled to an instruction on the subject, it seems to me that instruction No. 10, given by the trial court, was applicable to the evidence, and was in accord with the rule announced in the *Bourrett* case.

II. I can not concur in division 10 of the majority opinion. This division deals with instruction No. 11, given by the trial court. The instruction is set out in full in such division, and I will not repeat it. I do not think the instruction is amenable to the criticism which is made upon it, either as to its substance or form. The substance of this instruction is that, if by the exercise of ordinary care plaintiff could have avoided the collision by stopping his team after he heard the danger signal and saw the approaching train, it was his duty to stop it. As an abstract proposition, this sounds to me like elementary law, and yet this is the very point in which the instruction is

criticised. Surely, if the plaintiff saw the approaching train in time to stop by the exercise of ordinary care, he was as much bound to stop as was the engineer who saw the approaching team. There is no room in such a case for the application of the doctrine of last clear chance. It is also true in such a case that the engineer might properly assume that the plaintiff would avoid the collision, and that he might act upon such assumption until "it was made evident to him that plaintiff was about to come into a place of peril in spite of the warning." This instruction does not assume to determine plaintiff's contributory negligence as a matter of law upon the evidence, but it holds him only to the exercise of ordinary care. It requires the jury to determine whether *ordinary care after the plaintiff saw the approaching train* would enable him to avoid a collision by stopping his team. This proviso disposes also of the suggestion of "sudden peril," which is made in the majority opinion. Ordinary care was the measure of plaintiff's duty at all times. What would constitute ordinary care would vary and depend upon the circumstances surrounding him, including "sudden peril" or other distracting circumstances, and there is nothing in the instruction complained of which excludes the consideration of such circumstances by the jury in determining the question of ordinary care.

III. In the seventh division of such opinion the eighth instruction of the trial court is held to be erroneous. In this instruction the trial court instructed the jury that it was incumbent upon the plaintiff to prove that "he was free from all negligence on his part that caused, or in any manner contributed to, his injuries, as explained later in these instructions." It is held that plaintiff was not required to negative *all* negligence, and that the instruction was therefore erroneous. This holding of the majority opinion has support in the case of *Jerolman v. R.R. Co.*, 108 Iowa, 177, and my criticism is directed pri-

marily to the holding in that case. The holding in that case is so clearly out of line with our other cases that it has never been expressly followed until now, and I think it ought to be frankly overruled. The instruction under consideration in the *Jerolman* case was that the plaintiff must show herself free from "all negligence" which contributed to her injury. It was said in the opinion that this imposed upon the plaintiff a higher degree of duty than ordinary care. It was conceded therein that "any want of ordinary care, however slight," if it contributed to the injury, would defeat the plaintiff's cause of action. But it was argued therein that "slight want of ordinary care must not be confused with slight negligence." To my mind the reasoning at this point was not sound. It is a truism to say that the plaintiff must prove freedom from contributory negligence. *Freedom* from contributory negligence implies the exclusion of *all* contributory negligence. "Want of ordinary care" is the stereotyped definition of negligence when ordinary care is the measure of duty imposed. Negligence is want of ordinary care. Want of ordinary care is negligence. In the *Jerolman* case it was held that it would be proper to instruct that the plaintiff must show freedom from any want of ordinary care. "All negligence" and "any want of ordinary care" are equivalent under our stereotyped definition.

In the case of *Root v. R. R. Co.*, 122 Iowa, 469, the trial judge (the late Justice Bishop, then on the trial bench) evidently undertook to conform to the holding in the *Jerolman* case. He instructed the jury that it was incumbent upon the plaintiff to prove that she did not by her own negligence contribute "*in any material degree* to her own injury." This instruction was condemned as contrary to previous authorities. No reference however is made in the reversing opinion to the *Jerolman* case. In *Camp v. R. R. Co.*, 124 Iowa, 238, another trial judge instructed the jury that it was incumbent upon the plain-

tiff to show that he was not "to any material degree negligent himself." This phrasology was distinguished from that used in the *Root* case, and the instruction was sustained on the authority of the *Jerolman* case. In *Rietveld v. R. R. Co.*, 129 Iowa, 249, the *Jerolman* case is cited, among others, but it is in no sense followed on this point by any holding in the opinion. Indeed the language used in this opinion is contradictory, rather than confirmatory, of the *Jerolman* case in this respect. It is said therein: "Of course the plaintiff's negligence must be such as contributes proximately to his injury; but, if it does so in whole or in part, in any manner or to any degree, there can be no recovery on his behalf." The citation of the *Jerolman* case is made in support of the quoted proposition. The *Jerolman* case was decided ten years ago, and has never since been squarely followed on this point until now. The attempt to follow it in the *Camp* case resulted in a superfine distinction between the holding in the *Camp* case, *supra*, and the reverse holding in the *Root* case, *supra*. It seems to me, therefore, that the *Jerolman* case ought to be regarded as out of line with the great body of our cases, and as hypercritical. I see no way to follow it consistently without the constant necessity of urging verbal distinctions where no practical distinction exists.

Some point is made in the *Jerolman* opinion of the fact that the trial court had not defined negligence. In the case at bar instructions 4 and 9 contain a sufficient definition of negligence as being want of ordinary care. That objection, therefore, is not applicable here. To that extent this case can be distinguished from the *Jerolman* case. I think the instruction of the trial court on this question should be sustained.

STATE OF IOWA v. FRANK DYER, Appellant.

Murder in the first degree: INDICTMENT: SUFFICIENCY. An indictment charging that the shooting of deceased was with specific intent to kill and that it was done wrongfully, deliberately, pre-meditatedly and with specific intent to kill and murder, charges murder in the first degree.

Evidence: DYING DECLARATIONS. Statements concerning the homicide made by a deceased *in extremis*, and in the belief that he had been mortally wounded, are admissible as dying declarations.

Evidence: EXCLUSION: PREJUDICE. The erroneous exclusion of evidence which is subsequently admitted is not prejudicial.

Murder: SELF-DEFENSE: DUTY TO RETREAT: INSTRUCTION. The killing of an assailant is only excusable on the ground of self-defense, where it reasonably appears to be the only means of saving one's own life, or preventing great bodily injury. If the danger which appears to be imminent can be avoided in any other way, as by retreating, the taking of the life of the assailant is not justifiable.

Same. Where it appears that the accused had a room in the house of the deceased, but that the assault was made in one of the living rooms of the house and not in the room of defendant, his duty to retreat existed the same as though the assault had occurred at some other place where the rights of each were equal.

Murder: SUBMISSION OF LOWER OFFENSES. Where it is shown in a prosecution for murder that the deceased died within a few days after he was shot by defendant, the court's refusal to submit the question of defendant's guilt of some offense lower than a degree of homicide was proper.

Self-defense: EVIDENCE. Under the evidence in this case the question of whether accused shot deceased in self-defense was for the jury.

**Appeal from Monona District Court.—Hon. DAVID MOULD,
Judge.**

MONDAY, FEBRUARY 8, 1910.

REHEARING DENIED, THURSDAY, APRIL 14, 1910.

THE defendant was indicted for the crime of murder in the first degree. Upon trial he was convicted of manslaughter and appeals.—*Affirmed.*

Sullivan & Griffin, B. F. Ross and E. L. Conlin, for appellant.

H. W. Byers, Attorney-General, *Chas. W. Lyon*, Assistant Attorney-General, for the State.

DEEMER, C. J.—That defendant shot one E. C. Kirk and inflicted a wound from which he almost immediately died is practically admitted. Defendant relied largely upon the defense of self-defense. This defense was submitted to the jury, but without avail. For a reversal many propositions are relied upon, which we shall consider in the order presented by the briefs.

It is first insisted that the trial court was in error in submitting the crime of murder in the first degree, for the

reason that the indictment does not charge
1. MURDER IN THE FIRST DEGREE: indictment sufficiency.
that degree of homicide. To meet this proposition it will not be necessary to do more than set forth the charging part of the presentment. It reads as follows:

For that the said Frank Dyer then and there, and in and upon the body of one E. C. Kirk, willfully, feloniously, deliberately, premeditatedly, and with malice aforethought, did commit an assault with a deadly weapon, to wit, a revolver, then and there loaded with powder and ball, the particular description of said revolver being to this grand jury unknown, and said revolver being then and there held in the hands of the said Frank Dyer, and then and there the

said Frank Dyer did, with a specific intent to kill and murder the said E. C. Kirk, willfully, feloniously, deliberately, premeditatedly, and with malice aforethought, shoot off and discharge the contents of said deadly weapon at, against, and into the body of the said E. C. Kirk, thereby wrongfully, willfully, feloniously, deliberately, premeditatedly, and with malice aforethought, and with the specific intent aforesaid, inflicting upon the body of the said E. C. Kirk a mortal wound, of which mortal wound the said E. C. Kirk did, on or about the 3d day of March, A. D. 1909, die.

That this charges murder in the first degree, see cases cited in 1 McClain's Criminal Law, 367. It not only charges that the shooting was with the specific intent to kill, but also that it was done wrongfully, deliberately, premeditatedly, and with the specific intent to kill and murder. This is sufficient. *State v. Townsend*, 66 Iowa, 741; *State v. Stanley*, 38 Iowa, 526. The cases relied upon for appellant are not in point. In *State v. Andrews*, 84 Iowa, 88, there was no allegation that the killing was done deliberately, premeditatedly, and with malice aforethought, and the same defect appears in the indictment in *State v. Linhoff*, 121 Iowa, 632. Here both the assault and the killing are alleged to have been done with the intent to kill and murder.

II. The state was permitted, over defendant's objections, to introduce what were said to be the dying declarations of Kirk. It is said that no proper foundation was laid for this testimony. It sufficiently appears that, when these declarations were made, deceased was in *articulo mortis*. He then believed that he had been mortally wounded, had been told by his physician that he could not recover, and was in fact *in extremis*, under the rule announced in *State v. Murdy*, 81 Iowa, 603; *State v. Kuhn*, 117 Iowa, 216; *State v. Dennis*, 119 Iowa, 688, and other like cases.

III. Complaint is made of the court's refusal to per-

2. EVIDENCE:

dying declara-

tions.

mit defendant to testify as to why he thought the bullet which he shot ranged upward. As he afterward testified to this matter without objection, no prejudice resulted from the ruling on a previous question, even if it were erroneous.

3. **EVIDENCE:**
exclusion:
prejudice.

IV. The ninth instruction given by the trial court is complained of. It reads as follows:

In determining whether or not the shot was fired without legal excuse or justification, you are instructed that the defendant admits the killing of E. C. Kirk. And his claim is that in what he did he was acting in self-defense. You are instructed, in relation to this claim of the defendant, that where one is assaulted by another person in such a manner as to induce the person assaulted to reasonably believe that he is at the time in actual danger of losing his life, or of suffering great bodily harm, he is justified in defending himself, although the danger be not real, but only apparent, and he may use such force and means to defend himself as may in good faith appear necessary to him as an ordinarily prudent and courageous man, under all the circumstances at the time surrounding him. And he is not bound to draw nice calculations from appearances. All that is required of him is that he shall act from reasonable and honest convictions as to his danger, although mistaken as to the extent of said danger. But before one is justified in taking life in self-defense, it must be, or it must reasonably appear to be, the only means of saving one's own life, or of preventing great bodily injury. If it is evident to the assaulted that the danger which appears to be imminent can be avoided in any other way, as by retreating from the conflict, the taking of the life of the assailant is not excusable. And if you shall find from the evidence in this case that just before the defendant killed E. C. Kirk, he had been unlawfully assaulted by the said E. C. Kirk, and that from the character of said assault and the weapon used he had reason, as an ordinarily prudent and courageous man, to believe, and did in good faith and honestly believe, that he was in danger of being killed, or suffering great bodily injury, and that the parties were so situated that he could not

have retreated, or that he could not reasonably have expected to have preserved his life or protect himself from injury by retreating, then and in that case he was justified in using such force and such means to protect his life and person as may in good faith then have appeared necessary to him as an ordinarily prudent and courageous man, under all the circumstances then surrounding him, even to the taking of life. And if you shall find that he did not use greater force, or more hazardous means to protect his life and person than really appeared to him necessary as an ordinarily prudent and courageous man under the circumstances in which he was then placed, including the nature and manner of the assault, then and in that case the killing was not unlawful, and you should return a verdict of not guilty. But if you find that he did use greater force, or more hazardous means than appeared necessary to protect himself from great bodily harm, as an ordinarily prudent and courageous man under the circumstances in which he was then placed, including the nature and manner of the assault, you can not acquit him on the ground of self-defense. And, in determining whether or not the defendant in doing what he did acted in self-defense, you will remember that the burden of proof is upon the state to prove, beyond a reasonable doubt, that in doing what he did he was not acting in self-defense. If after considering all the evidence introduced in this case a reasonable doubt arises in your minds as to whether or not the defendant in doing what he did was acting in self-defense, then the state has not proved the defendant guilty beyond a reasonable doubt. 'A great bodily injury,' as used in these instructions, means a more serious bodily injury than results from an ordinary battery.

The chief complaint made of this is that it imposed upon defendant the duty of retreat. This is said to be error for two reasons: First, because one assaulted is not bound to retreat, but may repel force with force; and, second, because one in his own habitation is not bound to retreat under any circumstances. *State v. Goering*, 106 Iowa, 636; *State v. Evenson*, 122 Iowa, 88; *Young v. State*, 74 Neb. 346

⁴ MURDER: self-defense: duty to retreat: instruction.

(104 N. W. 867, 2 L. R. A. (N. S.) 66), are relied upon. None of these cases is in point. In the *Evenson* case defendant was accused of an assault with intent to inflict a great bodily injury, and in the *Goering* case the defendant was charged with a simple assault, and in each of these cases it was held that, where one is assaulted, and the character thereof does not involve life or great bodily injury, the person assaulted is not bound to retreat. That these cases are not applicable to the one at bar sufficiently appears from the following quotation, taken from *State v. Evenson, supra*: "We do not overlook the many cases wherein it is held that one may not, under the plea of self-defense, justify the taking of human life, if it reasonably appears that the same could have been avoided by making use of an avenue of escape open to him. But the principle thus declared upon has no application to a case where, as in the case at bar, one is wrongfully assaulted, and repels force by the use of like force. In the one case the law regards the liberty of the citizen to come and go as he pleases without molestation, save at the hands of the law, as the thing paramount. In the other case the law regards the temporary deprivation of the exercise of personal liberty on the part of one citizen as of less importance than is the life of another citizen, and this even though the latter is for the moment engaged in making an unlawful assault upon the former. Hence the injunction that a person assaulted must retreat, if he can do so in reasonable safety, before resorting to the extreme measure of taking the life of his assailant.

The rule applicable to this case is announced in *State v. Bennett*, 128 Iowa, 713; *State v. Rutledge*, 135 Iowa, 581; *State v. Jones*, 89 Iowa, 182; *State v. Warner*, 100 Iowa, 260, and other like cases. From the *Jones* case *supra*, we quote the following: "The specific objection to this instruction goes to that part of it which, under the facts recited, required the defendant to retreat or retire

from the conflict, unless it appeared to him, as a reasonably prudent man, that he could not retreat without danger to his life, or danger of great bodily injury. It may be conceded that in the earlier adjudications of this court there is language employed which may be said to lay down the doctrine that one who is assailed with a deadly weapon is not required to flee from his adversary, but may strike and kill in his own defense. See *Tweedy v. State*, 5 Iowa, 433. But in the latter utterances of this court, and it may now be said to be the general rule elsewhere, that the killing of an assailant is excusable on the ground of self-defense only when it is, or reasonably appears to be, the only means of saving one's own life, or preventing great bodily injury. If the danger which appears to be imminent can be avoided in any other way, as by retiring from the conflict, the taking of the life of the assailant is not excusable." In the *Warner* case we said: "We have stated the rule applicable to the law of self-defense. In the late case of *State v. Jones*, 89 Iowa, 183, it is said: 'That the killing of an assailant is excusable on the ground of self-defense only when it is, or reasonably appears to be, the only means of saving one's own life, or preventing some great bodily injury. If the danger which appears to be imminent can be avoided in any other way, as by retiring from the conflict, the taking of the life of the assailant is not excusable.' The instructions of the court upon this branch of the case are assailed as erroneous. We will not set them out. They are in accord with the rule above announced, and with many other cases determined by this court." In *State v. Bennett, supra*, we said: "In the earlier cases in this court it was held that there was no duty to retreat where one was assailed with a deadly weapon. See *Tweedy v. State*, 5 Iowa, 433. While in the later adjudications it has been held that such duty exists under ordinary circumstances. See *State v. Jones*, 89 Iowa, 182, and cases cited therein. But none of the

latter cases decide the exact point involved here, which is, briefly, whether a person, while on his own premises, must retreat from a felonious assault. It is the universal rule that the dwelling house is the castle, and that no retreat is necessary therein, and we see no sound reason for holding that a greater obligation exists when the accused is on his own premises, where he has a right to be, and which constitutes a part of his residence and home."

It does not appear that defendant was on his own premises when he claims to have been assaulted by the deceased. The most that can be said is that he had a room in the

house of the deceased which he called his
5. SAME. own, and that he made his home there.

The alleged assault was not made upon him while he was in his room, but in the dining room or parlor of the house belonging to the deceased. This was not defendant's castle. It belonged to and was occupied by the deceased, and defendant was not, under the circumstances, permitted to stand his ground in order to defend his premises. In other words, the duty of retreat applied to him just the same as if he were upon the street, or in any other place where the rights of the disputants were equal. Generally speaking, the duty of retreat applies in this jurisdiction, and the rule was correctly stated by the trial court in its instruction which is now challenged.

V. As the deceased died within a few days after he was shot, the trial court did not err in refusing to submit to the jury the question of defendant's guilt of some offense lower than a degree of homicide. *State*

6. MURDER: sub-
mission of
lower offenses. *v. Perigo*, 80 Iowa, 37; *State v. Mahan*, 68 Iowa, 304; *State v. Walker*, 133 Iowa,

489. Under the testimony defendant was guilty of manslaughter, if guilty of any offense, and there was no error in not submitting the various degrees of crime lower than that offense.

VI. Lastly, it is argued that the testimony fails to show that defendant was not acting in self-defense. We are not disposed to take this view of the case. That question was primarily for a jury. From the evidence, testimony it appears that the deceased was very drunk, and that while he may have assaulted, or attempted to assault, defendant with a knife, the way for escape was open and easy. Other persons were present to aid the defendant, and they had succeeded, down to the time of the shooting, in keeping deceased away from the defendant. Defendant had armed himself with a gun before having any trouble with the deceased. He knew that deceased was much intoxicated, and a jury may very well have found that he could easily have avoided the assault, which he claims deceased was threatening to make with a knife. We can not say, as a matter of law, that defendant was acting in self-defense. That was a fair question for the jury under the record before us.

No prejudicial error appears, and the judgment must be, and it is, *affirmed*.

GEORGE DUFFEY v. CONSOLIDATED BLOCK COAL Co.,
Appellant.

Master and servant: ASSUMPTION OF RISK: PLEADING: INSTRUCTIONS.

- 1 In personal injury actions the assumption of ordinary risks incident to plaintiff's employment need not be specially pleaded; but where the assumption of risk has reference to that arising out of the negligence of the master, when such negligence is known to the employee and the danger is appreciated by him, it is incumbent on the defendant to plead the same as an affirmative defense, and when not so pleaded the court is not required to instruct on the subject.

Mines and mining: EVIDENCE: CUSTOM: HARMLESS ERROR. Where 2 a coal miner was injured by being caught between a loaded car on which he was riding and a rock protruding from the roof of the entry, and a witness testified that he had made a measure-

ment of the height of the entry immediately after the accident, any error in permitting him to state that it was the duty and general custom of the pit committee, of which he was a member, to examine the circumstances of an accident, and that his measurement was made for that reason, was not prejudicial; since the same was purely explanatory and in a sense personal to the witness.

Same: CONTRIBUTORY NEGLIGENCE. Evidence of the usual and customary method of performing work is competent on the question of the contributory negligence of one injured while performing the work.

Evidence: PREJUDICE: WAIVER OF OBJECTION. A party can not complain of the prejudicial character of evidence which he himself subsequently introduced upon the trial.

Same: PAIN AND SUFFERING. Complaints of existing pain of one sustaining an injury are admissible on the question of damages, and need not be confined to a time approximating the date of the injury.

Examination of witnesses: DISCRETION. The court has a discretion in the matter of the examination of witnesses; and where a party has rested his cross-examination, having had also the privilege of a re-cross-examination, the court may properly terminate the examination at that point.

Evidence: PREJUDICE. Various items of evidence in this case are referred to and held to be nonprejudicial.

Appeal from Appanoose District Court.—Hon. D. M. Anderson, Judge.

TUESDAY, FEBRUARY 8, 1910.

REHEARING DENIED, THURSDAY, APRIL 14, 1910.

THIS is an action for personal injuries. There was a verdict and judgment for the plaintiff. Defendant appeals.—*Affirmed.*

Wilson & Smith and H. W. Byers, for appellant.

Howell & Elgin, for appellee.

EVANS, J.—At the time of the injuries complained of the plaintiff was a coal miner and an employee of the defendant. The defendant was operating its mine in what is known in the record as the "low coal" district. The coal vein in this region is thin, and the entries are correspondingly low, usually running less than five feet in height. On the day of the accident plaintiff was directed by the pit boss to engage temporarily in driving a mule in one of the entries, known in the record as the "first left entry." That is to say, the cars were drawn by a mule, and the plaintiff was required to bring in loaded cars from the miners' rooms, and to take back empty cars for distribution thereto. According to plaintiff's evidence, he was not familiar with the work, and, he entered some degree of protest against it. The pit boss assured him that it was a safe entry, and pressed the service upon him. According to his understanding, the mule presented some elements of danger. She would "kick and balk." Because of this fact, and because of his lack of experience, he entered upon the work with some trepidation, and doubtless with some lack of skill. He made two round trips without incident, and was engaged upon the third when the accident happened. While bringing in a string of loaded cars, he was caught between the load and a rock overhead, which protruded from the roof at one side of the entry several inches lower than the face of the rock on the other side thereof. In his previous trips he had necessarily passed this point five times, but had not observed this condition of the roof. He had not passed under this protruding rock, but had passed to one side of it, where the roof was higher. There was sufficient evidence to go to the jury on the question of defendant's negligence and plaintiff's contributory negligence, and no serious complaint is made as to the form of the instructions. The jury returned a verdict for the plaintiff for \$150.

I. Appellant complains because the trial court failed

to instruct the jury on the subject of assumption of risk. Appellant submitted to the trial court three instructions on

1. MASTER AND
SERVANT: as-
sumption of
risk; plea-
ding; instruc-
tions.

the subject, which the trial court refused. The first of these requested instructions laid upon the plaintiff the burden of proving that he did not assume the risk involved in passing through the entry at the place of injury. This was clearly erroneous as an abstract proposition. Assumption of risk is an affirmative defense, and the burden is upon the defendant to plead it and prove it.

Assuming that the other two instructions asked on the subject were correct as abstract propositions of law, they were properly refused because the defendant had not pleaded such defense. The only reference to the subject contained in its answer is the following: "Defendant further states that whatever injuries, if any, the plaintiff received were such as he assumed the risk of in his employment by the company." The term "assumption of risk" has come to be used in a twofold sense. It is often said that an employee assumes the ordinary risk that is incident to his employment. This form of assumption of risk is often pleaded by defendants in personal injury cases, although it is quite unnecessary to do so. Assumption of risk in its true sense has reference to those risks arising out of the negligence of the master when such negligence is known to the employee, and the danger therefrom appreciated by him. In the first form herein indicated a specific pleading of assumption of risk of the ordinary dangers incident to an employment is a mere amplification of the general denial, and adds nothing to it in a legal sense. In the second form herein indicated it is an affirmative defense, and must be specifically pleaded as such. *Sankey v. R. R. Co.*, 118 Iowa, 39; *Mace v. Boedker*, 127 Iowa, 731; *Martin v. Light Co.*, 131 Iowa, 734; *Beresford v. Coal Co.*, 124 Iowa, 39. The most that can be said of defendant's pleading in this respect is that it sets

up an assumption of risk in the first form. There is no suggestion in it that plaintiff knew the defect complained of, or that he ought to have known it, nor any suggestion that he knew, or ought to have known, of the danger arising therefrom. The trial court therefore properly refused to submit the issue to the jury.

II. Complaint is made because the court permitted the witness Coop to testify as to the duties of the "pit committee," of which he was a member. This witness had made a

2. MINES AND
MINING: evi-
dence: cus-
tom: harmless
error.

measurement of the height of the entry at the alleged place of the accident immediately after it happened. The testimony complained of was given in explanation of the circum-

stance of measurement. He stated, in substance, that when an accident happened it was the duty and "general custom" of the pit committee to examine the circumstances of the accident, and that that was how he came to make the particular measurement. The testimony was purely explanatory, and was, in a sense, personal to the witness. It was clearly within the discretion of the trial court to permit it, and we can see nothing in it that was in any sense prejudicial to the defendant.

There was much inquiry of witnesses throughout the trial on the subject of "general custom," and appellant complains of it *en masse*. It is urged upon us that proof of

3. SAME: con-
tributory
negligence.

"general custom" has become entirely too

common in the trial of cases in the "low coal" district. It is urged in substance that it has become the "general custom" of lawyers in personal injury cases in such district to supply all deficiencies of evidence as to real facts with proof of some "general custom." We find nothing in this case that affords the appellant any just ground of complaint. It was incumbent upon the plaintiff to show freedom from contributory negligence. The cross-examination by defendant was directed towards showing contributory negligence on the part of the plaintiff. As

bearing upon this question, the usual and customary method of doing the work was properly shown. These usual and customary methods were often referred to as "general custom." The most that can be said is that it presented a slight inaccuracy in the use of terms.

III. As bearing upon the customary methods obtaining in the mine, the plaintiff produced a written agreement, said to obtain between the miners and operators, and identi-

^{4. EVIDENCE:} ^{prejudice:} ^{wavier of ob-} fied it by a witness as being the one "in force" at the time of the alleged accident.

To this the defendant objected as incompetent, immaterial, and secondary, and the mere conclusion of the witness. We see little materiality to the evidence complained of, and the court might well have excluded it on that ground. On the other hand, it was plainly nonprejudicial. That the defendant deemed it nonprejudicial is indicated by the fact that later in the trial it introduced the same agreement in evidence.

IV. Certain witnesses on behalf of plaintiff were permitted to testify to his complaints of existing pain at a time long subsequent to the date of the injury. It is urged that

^{5. SAME:} ^{pain} ^{and suffering.} this was improper, and that such evidence should be confined to a time approximating the date of injury. Under our previous decisions, this question is not even debatable. *Keyes v. Cedar Falls*, 107 Iowa, 509; *Hamilton v. Coal Co.*, 120 Iowa, 149; *Taylor v. Coal Co.*, 110 Iowa, 40.

V. One Martin was examined by the plaintiff, and testified as to the nature of the duties which devolved upon a driver in the mine. The defendant complains because of

^{6. EXAMINATION} ^{OF WITNESSES:} the refusal of the court to permit certain discretion. cross-examination. The line of such examination is indicated by the following question: "Mr. Martin, in this class of mines, it is a matter of common knowledge among all the miners who work in a mine like this that these entries change overnight, is it not?"

This question was pertinent and proper as cross-examination. The question, however, was put by the defendant to the witness as a recross-examination after the plaintiff had closed his direct examination. There was no claim of oversight on the part of the defendant, and no reason stated why the question was not put during the cross-examination proper. The plaintiff was entitled to the last word with his witness. This was the second time that the witness was called to the stand. The defendant had had the privilege of cross-examination and recross-examination when the witness was first called. He had rested his cross-examination upon the second call. It was within the proper discretion of the trial court to terminate the examination when it did.

VI. Other points are argued by counsel, but the foregoing are illustrative of them all. We can not take the time to discuss them in detail. The following points

^{7. EVIDENCE:} in the brief speak for themselves: "(5) A
prejudice. witness should not be allowed to answer a question which calls for an invasion of the province of the jury. . . . (7) What the witness himself would expect to find is inadmissible. (7½) It is legitimate cross-examination of an expert to ask questions pertinent to the matter involved. (8) A witness should not be allowed to say a person looked better or that he believed a person to be more vigorous, before than after an injury. (9) It is an invasion of the province of the jury for a witness to say that there is greater or less liability to be struck under certain conditions. (10) It is a conclusion that mules are liable to take to strangers."

We have no occasion to take issue with the appellant on any of the foregoing propositions, but they present nothing decisive for our consideration. As to the last-stated proposition, the complaint is that the character of the mule was proved by "general custom." That line of proof seems to have been acquiesced in at the trial. Even the defend-

ant proved that it takes some time for a driver to "get onto the way of a mule." Only one mule was involved in this particular case. The testimony was not altogether harmonious as to what a man of ordinary courage might reasonably expect from her. Whether she should be deemed a gentle mule or a kicking mule would seem to depend upon the point of view. One of defendant's witnesses testified that she was not a kicking mule, although he had "seen her kick." Whether he intended thereby to classify her as gentle or as merely normal does not appear. She was said to be twenty years old, and this was deemed to be in her favor. While this lengthened her history and possibly enlarged her reputation, it tended to soften her normal propensities and to reduce her expectancy. To the plaintiff, at least, she seemed a present peril.

Defendant's witnesses contended that the plaintiff ought to have taken his position on the "tail chain" at her heels, with one hand upon her tail, and the other upon the front end of the car. It is said that this position enables the driver to keep his head below the sky line of the mule's back, and that it is one from which he may be easily dislodged in case of accident. But the plaintiff chose to ride upon the "drawbar" in the rear of the first car, and preferred the risk of unknown danger to that which was obvious and imminent. His witnesses testified that this was a proper place, and in accord with the "general custom." This latter "general custom" has arisen somewhat in deference to the "general custom" of mules. It is in this wise that the propensities of the motive power have become involved in the legal subject of "general custom." This is the concrete case. We see no way to apply it to any legal principles with entire safety to the great body of the law, which might well deem the "drawbar" preferable to the "tail chain" in such an application. Unique as the subject is, we are disposed to the opinion that the evidence was generally competent. But whether competent or

incompetent, it is certain that the defendant was not hurt by it.

We find no prejudicial error in the record, and the judgment below is *affirmed*.

W. B. COLLINS ET AL. v. CITY OF KEOKUK and HENRY REES, Appellants.

Municipal corporations: PUBLIC IMPROVEMENT: DISCRETION OF COUNCIL: REVIEW. The discretion reposed in a city council to determine whether public interest requires the improvement of streets and alleys is not open to judicial review, in the absence of some showing of fraud or oppression.

Same: CONTRACTS FOR PUBLIC IMPROVEMENT: FILING OF THE SAME. The statute requires the filing of a contract for making a public improvement with the city clerk prior to the commencement of the work; but where it appears that the work was done under a contract, mere failure of the clerk to discharge his ministerial duty to file the same will not render the contract void if in fact duly made.

Same: COST OF IMPROVEMENT: PAYMENTS. A city's portion of the cost of paving an alley is properly payable out of the city's general revenue.

Same: ORDINANCES AND RESOLUTIONS: SIGNATURE OF MAYOR. Although the statute requires that ordinances and resolutions of a city council shall be signed by the mayor before they shall take effect, except under certain conditions; still, where a city is acting under a special charter which provides that such city may have a president *pro tempore*, to be regularly chosen each year, whose duties are to preside at sessions of the council in case of the sickness or temporary absence of the mayor, and for the time being to perform the duties and functions of the mayor, his signature to a resolution of necessity for a public improvement, passed during the illness of the mayor, was sufficient.

Same: OBJECTION TO ASSESSMENT: INJUNCTION: WAIVER OF OBJECTION. Objection by a property owner to the regularity and sufficiency of the primary steps taken by a city council, in ordering a public improvement and making an assessment for the cost, must be taken advantage of by objections filed with the city council and

an appeal from its adverse ruling; such objections, not going to the question of jurisdiction of the council to proceed to levy or enforce the assessment, can not be made the basis of a suit to enjoin the assessment. And where a property owner appears before the council and objects to certain irregularities in the proceedings, which objections are overruled, he can not thereafter raise such questions in a suit to enjoin the assessment.

Appeal from Lee District Court.—Hon. HENRY BANK, Jr., Judge.

TUESDAY, FEBRUARY 8, 1910.

REHEARING DENIED, THURSDAY, APRIL 14, 1910.

ACTION in equity to enjoin the enforcement of a special assessment on the property of plaintiffs for street improvements, and to have cancelled certain certificates issued by the city to the contractor in payment therefor. There was a decree for the plaintiffs, and the defendants appeal.—*Reversed.*

J. J. Seerley and A. T. Marshall, for appellants.

W. B. & H. R. Collins and John P. Hornish, for appellees.

McClain, J.—I. In May, 1905, a resolution was passed by the city council of Keokuk with reference to the repavement of an alley in said city on which the prop-

erty of plaintiffs abutted at the expense of ^{1. MUNICIPAL CORPORATIONS: public improvement: discretion of council: review.} the abutting property. In July following, before a contract for the improvement had been let, plaintiffs instituted this action to

enjoin defendants from paving said alley at the expense of the property owners; the ground alleged for the relief being that the alley was macadamized with stone and in good and ordinary repair and condition, and

that the action of the council in ordering the paving of the alley was not necessary for the public and private use thereof, and was beyond its discretion and power, and oppressive to abutting property owners. A demurrer to this petition was sustained, and the allegations with reference to the unnecessary and improper exercise of power on the part of the council in ordering the pavement of the alley which was not for the public interest and was oppressive to the abutting property owners was not again raised, and no relief was granted to plaintiffs on those grounds. Moreover, it is apparent that plaintiff was not entitled to any relief of that character, for the discretion of the council in determining whether the public interest required the making of the improvement was not open to judicial review, in the absence of some allegation and proof of fraud and oppression. *Des Moines Gas Co. v. Des Moines*, 44 Iowa, 505; *Brewster v. Davenport*, 51 Iowa, 427; *Dewey v. Des Moines*, 101 Iowa, 416; *Swan v. Indianola*, 142 Iowa, 731.

II. In an amendment to the petition filed before the completion of the work, it was alleged that no certified copy of the contract to grade and pave was on file with

the clerk, and that the city was indebted beyond its constitutional limit, so that any contract incurring an indebtedness would be void. The filing of the contract with the clerk before the commencement of the work is required by Code, sections 812, 966; but it appears from the record that the work was finally done under a contract, and it is plain that the failure of the clerk to discharge his ministerial duty in this respect would not render the contract void, if in fact it was duly made. At most, it was only an error or irregularity which might be made the basis of an objection before the city council as hereinafter indicated.

III. From the evidence it appears that the only ex-

pense to the city involved in the improvement was an item of \$6.43. This amount was in fact paid and was properly payable out of the general revenue of the city. Code, sections 820, 830, 832, 967, 979, 984; *Corey v. Ft. Dodge*, 133 Iowa, 666; *Swan v. Indianola*, 142 Iowa, 731.

IV. After the improvement had been completed and accepted by the city and the assessment therefor had been levied upon the abutting property, plaintiffs filed another amendment to their petition, alleging that the resolution of intention was illegal because not signed by the mayor nor presented to him for signature. By Code, section 685, it is required that ordinances and resolutions passed by the city council shall be signed by the mayor before they shall take effect, unless the mayor shall fail to call a meeting of the council within fourteen days and return the ordinance or resolution with his reasons for refusing to sign, or, on the return of such ordinance or resolution to the council with the mayor's objection, it shall be passed over his objections by not less than two-thirds vote. Under this statute signature by a temporary chairman of the council is not sufficient. *Moore v. City Council of Perry*, 119 Iowa, 423. But the city of Keokuk is acting under a special charter which provides that, in case of the sickness or temporary absence of the mayor, the duties of his office during such sickness or temporary absence shall be discharged by a president *pro tempore*, who is to be regularly chosen at a specified meeting each year, and who shall in the absence of the mayor preside over the sessions of the council, and for the time being perform all the duties and functions of the mayor. Now it appeared that, when the resolution of intention above referred to was passed by the city council, the mayor of the city was sick and unable to attend to business, and that the resolution was signed by the president *pro tempore* of the council

3. SAME: cost
of improve-
ment: pay-
ments.

4. SAME: ordi-
nances and
resolutions:
signature of
mayor.

who presided at the session. We think that, under the charter of the city, this president *pro tempore* was in fact and in law discharging the duties of mayor, and was for the time being the mayor of the city, so that his approval of the resolution was sufficient. Although the requirement of Code, section 685, that the resolution must be signed by the mayor is by Code, section 952, made applicable to cities acting under special charter, that requirement was in fact complied with, for the charter of the city authorizes the appointment of an officer who should exercise the authority of mayor in case of the sickness or temporary absence of that officer.

V. The objections above referred to, as well as many others relating to alleged errors and irregularities in the making of the assessments and in the prior proceedings,

5. ~~SAME: objection to assessment: injunction: waiver of objection.~~ were set forth in objections filed by plaintiffs before the city council, as provided in Code, section 823. These objections were

by the council overruled, and the assessments were confirmed. Plaintiffs appealed from this action of the council under the provision made in that respect by Code, section 839, and this appeal was still pending in the district court when the case now before us was tried. We have no occasion to determine the sufficiency of the grounds of objection thus presented to the city council, nor the merits of the appeal. It is sufficient to say that the proceeding by the filing of objections and appeal is exclusive of the remedy sought in this case by injunction. The regularity and sufficiency of the initial steps in the ordering of the work and making of the assessment must be questioned in the method pointed out, and can not be made the basis of an action to enjoin the assessment of the costs after the work has been completed, and objections not thus made are waived. Code, sections 824, 965, 966. The case of *Bennett v. Emmetsburg*, 138 Iowa, 67, relied upon by plaintiffs as supporting their right to an injunc-

tion on account of various alleged irregularities and defects in the proceedings, has been overruled in *Clifton Land Co. v. Des Moines*, 144 Iowa, 625, a case decided since the determination of the present case in the lower court. In view of what is said in that case, it is unnecessary to discuss the objections presented in this proceeding to the regularity of the steps taken by way of specifying the material to be used, the filing of a plat by the city engineer, the filing of a certified copy of the contract with the clerk, and in other respects. Only those objections which go to the jurisdiction of the council to proceed can be presented in an action to enjoin the levy or enforcement of an assessment for the improvement as made, and none of the objections now referred to are of that character. The proceeding for the making of this improvement was in fact properly instituted. The work was done under a contract let in pursuance of proper resolution, and, when completed, the work was accepted by the city council. Plaintiffs did, in fact, appear before the council and make their objections to alleged irregularities in the proceedings and insufficiency of the work as done. These objections were overruled. It is not competent for plaintiffs now to raise these objections in a proceeding to enjoin the enforcement of the assessment. The decree of the trial court is therefore reversed, and the case is remanded, with direction that plaintiff's petition be *dismissed*.

FRED. H. WINSLOW, Appellee, v. COMMERCIAL BUILDING COMPANY, Appellant.

Master and servant: SAFE PLACE TO WORK: DUTY OF MASTER: DELEGATION OF DUTY. It is the duty of the master to provide a servant with a reasonably safe place in which to work, and this duty can not be delegated; and, as in this case, the owner of a building is liable for injuries to his servant resulting from the negligence

of an independent contractor in failing to properly fasten a fire escape to the building.

Same: NEGLIGENCE OF MASTER: FACT QUESTION. The question of whether the master in the instant case might have discovered that the fire escape was not properly fastened to the building, and have remedied the defect prior to the accident to plaintiff, was for the jury.

Same: NEGLIGENCE: ASSUMPTION OF RISK. The mere fact that from a superficial view the fire escape appeared to plaintiff to be firmly fastened to the building was not sufficient, as a matter of law, to relieve the owner from liability for plaintiff's injuries resulting from the negligence of the contractor in fastening the same.

Appeal from Blackhawk District Court.—Hon. C. E. RANSIER, Judge.

TUESDAY, JANUARY 18, 1910.

SUPPLEMENTAL OPINION, TUESDAY, MAY 3, 1910.

ACTION at law to recover damages for personal injury. Judgment for plaintiff, and defendant appeals.—*Affirmed.*

Carr, Carr & Evans and J. E. Williams, for appellant.

Boies & Law and Edwards & Longley, for appellee.

WEAVER, J.—The defendant was the owner of a six-story office building in the city of Waterloo, and employed the plaintiff as a janitor therein. Upon the outer wall of this building, the defendant, in obedience to law and to an ordinance of the city, constructed and maintained an iron fire escape. It was built upon the usual plan, with a platform at each floor above the first story, all being connected by flights of stairs. To connect the first platform with the ground below there was an adjustable "emergency ladder," hung upon iron or steel supports at-

tached to or fastened in the brick wall of the building. Acting within the scope of his employment, plaintiff was engaged in superintending or assisting the work of painting the fire escape. Beginning at the top or sixth story, he worked his way down to the lower platform, from which he entered upon the emergency ladder. Standing upon the ladder some fifteen or twenty feet above the ground, he leaned out to inspect the painting on the under side of the platform, when the supports on which the ladder was suspended pulled from their fastenings, and plaintiff was thrown down, receiving severe injuries. Defendant is charged with negligence, in that the supports of the ladder had not been properly attached to or fastened in the wall when the fire escape was constructed; that defendant knew, or in the exercise of due care ought to have known, the defective condition of the fire escape, and failed to remedy it or to warn plaintiff of the danger therefrom; that said fire escape was not constructed in accordance with the provisions of the city ordinance which required the device to be firmly attached to the building, and plaintiff alleges that, by reason of such negligence, he was injured without contributory fault on his part, and demands a recovery in damages. The defendant admits that plaintiff was in its employment substantially as alleged by him, but denies any negligence or want of reasonable care on its part. It further alleges that the danger of injury such as plaintiff sustained was one of the risks incident to his said employment, and therefore assumed by him in accepting the position. There was a verdict and judgment for the plaintiff in the sum of \$1,750.

The plaintiff's testimony tended to show that at the time of his injury he was acting within the line of his duty in the employment of defendant, and was exercising reasonable care for his own safety. It also tended to show that the ladder supports were not properly or safely at-

tached to the wall, and that the defect was probably one of original construction. The evidence on part of the defendant was devoted solely to the proposition that the fire escape had been constructed by an independent contractor, the defendant exercising no supervision or control as to the manner of doing the work, and that, in selecting the contractor to perform the work, it exercised due care and caution to secure one who was skilled in the business and competent to perform it in an efficient and proper manner. The sufficiency of this line of defense is the question presented by the record before us.

Stated in succinct form the question may be put in these words: "Is the master's obligation to furnish his servant a safe place to work fully satisfied and discharged

1. **MASTER AND
SERVANT: safe
place to work:
duty of
master: dele-
gation of
duty.**

by the exercise of reasonable care in selecting a competent independent contractor to make it safe?" To sustain the affirmative of this proposition, the appellant relies upon

the familiar line of authorities which hold that as a general rule the doctrine of *respondeat superior*, which arises from the relation of master and servant, and makes the master answerable to third persons for the acts or omissions of the servant within the scope of his employment, has no application as between a contractee and an independent contractor, and that the former is not answerable to the servant of the latter for acts or omissions of such contractor in the performance of his contract. Were the question uncomplicated by inharmonious precedents, it would seem that the inapplicability of the rule to a case like the one at bar would be self-evident. There is nothing better settled in the law of master and servant than that the duty of the master to provide the servant a reasonably safe place to work is absolute and nondelegable. The obligation can not be shifted from the master to a fellow servant or to any other third person. It is also a continuing duty and care in furnishing a safe

place at the beginning of the employment must be followed by reasonable supervision, inspection, and care to keep it save until the relation of master and servant is at an end. On the other hand, in the case of an independent contractor, he is himself the employer, and has his own servants who look to him for the safety of their place of work, and he alone is liable to his servant or other person who is injured by his negligence *in the execution of his contract*. If, for instance, plaintiff had been the servant of the contractor who constructed the fire escape, and had received his injury *in the progress of that work* without contributory fault on his part, the rule as to independent contractors would clearly apply, and the owner of the building could not be held liable for the damages so sustained. But, when the contract was performed and the completed work accepted by the defendant, the relation of owner and independent contractor was dissolved, and thereafter could in no manner affect the obligation of such owner as an employer of labor in and about the structure thus erected. *Bailey v. Mayor*, 3 Hill (N. Y.) 531 (38 Am. Dec. 669); *Boswell v. Laird*, 8 Cal. 469 (68 Am. Dec. 345); *Gorham v. Gross*, 125 Mass. 240 (28 Am. Rep. 224); *Read v. East*, 20 R. I. 574 (40 Atl. 760); *First, etc., v. Smith*, 163 Pa. 561 (30 Atl. 279, 26 L. R. A. 504, 43 Am. St. Rep. 808).

While the cases here cited did not arise between master and servant, they go to the fundamental principle limiting and defining the extent to which the plea of "independent contractor" is available to a party owner when sued by a third person for damages occasioned by the defective condition of such owner's premises. The distinction between the responsibility of one who fails to perform a duty which the law requires him to perform and his liability for the negligence of those who are employed in doing the work is noted by Lord Blackburn in *Mercy D. & H. Board v. Gibbs*, 11 H. L. Cases, 686,

where he says that in cases governed by this principle "it is immaterial whether the actual actors are servants or not." In *Pickard v. Smith*, 10 C. B. N. S. 470, it is said that the rule respecting the nonliability of the owner or employer for the acts of a contractor is inapplicable to cases in which the contractor is intrusted with a duty incumbent upon his employer and neglects its fulfillment whereby an injury is occasioned. See, also, to the same effect, *Penny v. District*, 2 Q. B. 72. The case as between master and servant falls within the general rule that, wherever the law imposes a personal duty upon any one, he can not escape responsibility therefor or for the manner of its performance by employing a substitute. 1 Thompson, Negligence, sections 532, 665; *Texas R. Co. v. Juneman*, 71 Fed. 939 (18 C. C. A. 394); *Wilson v. White*, 71 Ga. 506 (51 Am. Rep. 269); *Houston Ry. Co. v. Meador*, 50 Tex. 77; *Hegeman v. Western R. Corp.*, 16 Barb. 353; same case on appeal, 13 N. Y. 9 (64 Am. Dec. 517). In the last cited case a railroad company sought to escape liability to a passenger by showing that a defective axle had been procured from a reputable and competent maker, and disclosed no exterior evidence of the defect. In upholding a verdict for the plaintiff, the court says that the law placed upon defendants the duty of furnishing a safe car for the passenger, and, while they were not required to become smelters of iron or builders of cars, they were required to exercise the requisite degree of care to make the car safe, and in so doing "they may construct it themselves or avail themselves of the services of others, but in either case they engage that all that well directed skill can do has been done for the accomplishment of this object. A good reputation upon part of the builder is very well in itself, but ought not to be accepted by the public or the law as a substitute for a good vehicle." See, also, *Brehm v. Railroad*, 34 Barb. 256.

Speaking to the question whether a master can by

employing a contractor to perform a duty which he owes to his servants relieve himself from liability for its non-performance, Mr. Labatt, a recognized authority on the law of master and servant, says: "The weight of authority would seem to be distinctly in favor of the doctrine that a master can not escape his responsibility by such a delegation of his duties. This, it is submitted, is the only doctrine which is logically tenable and which can be reconciled with general principles." See note to *Anderson v. Fleming*, 66 L. R. A. 153. In *Trainor v. Railroad Co.*, 137 Pa. 148 (20 Atl. 632), the court approves the rule that "the master owes to the servant the duty of providing a reasonably safe place to work in and reasonably safe appliances with which to do the work, and the delegation of this duty to an agent or independent contractor will not relieve the master from the responsibility for an injury to the servant resulting from such neglect." Many other cases and precedents lend support to this theory of the law, and, indeed, it is difficult to conceive how the courts can hold that the duty of care on the part of the master to provide a safe place to work is absolute and nondelegable, and at the same time say that he may delegate or shift the responsibility to the shoulders of a contractor. To affirm both propositions is to effectually negative both. That the decisions on the subject can not well be reconciled may be conceded.

The one oftenest cited in support of appellant's position is *Devlin v. Smith*, 89 N. Y. 470 (42 Am. Rep. 311). There a contractor for the construction of a public building let the contract to another to erect a scaffold needed in the progress of the work; the subcontractor furnishing his own materials and help, and building the scaffold after his own methods. The work was so defectively done that, when the principal contractor's servant went upon the scaffold, it fell and injured him, and it was decided that the servant's cause of action was against

the subcontractor alone. In our judgment the conclusion as broadly stated in that opinion can not be sustained upon principle, but its scope and effect appear to have since been very materially narrowed. In *Vosburgh v. Railroad Co.*, 94 N. Y. 374 (46 Am. Rep. 148), the defendant, seeking to escape responsibility for a defective bridge which it had purchased from the builder, cited the *Devlin* case as an authority in point, and the court, referring to the facts on which that decision had been made to turn, says: "If the scaffold instead of a temporary had been a permanent structure intended for continuous use throughout the years, and imposing upon Smith the duty of an inspection by skillful and competent agents whose proper performance of that duty would have disclosed defects of construction which made it unsafe, again a different question would have been presented." As thus restricted, *Devlin v. Smith*, is not in point with the case at bar, for the structure here in question was a permanent structure, which, if well constructed, could be expected to answer the purpose for which it was designed practically as long as the building to which it was affixed.

Defendant pleads and proves that it gave the manner and method of the construction of the fire escape no attention or supervision whatever, leaving the work wholly

^{s. SAME: negli-} to the contractor, and, except the official in-
^{gence of}
^{master: fact} ^{question.} spection by the city when the work was com-
pleted, there is no claim that it was ever in any manner inspected, or its strength and safety in any manner tested prior to the plaintiff's injury, some two years later. It may be, as counsel argue, that reasonable inspection by defendant would not have revealed the weakness of the ladder's support, but we can not so hold as a matter of law. It was for the jury to say whether due care would have discovered the defect and applied a remedy before the accident.

The mere fact that to a superficial view the fire escape

appeared to be firmly attached to the building is not a sufficient answer to this suggestion. If each and all of
3. SAME: negligence: assumption of risk. the several supports of the fire escape had extended but an inch or two into the wall, just sufficient to hold the device in place until it had passed inspection, thus constituting a veritable trap for any person having occasion to use it, the surface appearance presented would doubtless have been as perfect as if it were thoroughly well made, yet it would not do to hold as a matter of law that such superficial inspection would fill the full measure of the owner's duty to provide his servant a safe place to work. Of the other cases cited by counsel, *Haley v. Jump River Co.*, 81 Wis. 412 (51 N. W. 321, 956), disposes of the question without discussion and expressly upon the supposed authority of *Hackett v. Telegraph Co.*, 80 Wis. 187 (49 N. W. 822), which is not parallel in fact or principle with the one we have under consideration. *Butler v. Townsend*, 126 N. Y. 105 (26 N. E. 1017), is a New York case of the type of *Devlin v. Smith*, and subject to the same restricted application.

The standard to which the master must conform is that of reasonable care. He may employ servants or contractors to do the work which the law requires of him, but he can not delegate to them the exercise of the care which the law imposes upon him as a personal obligation.

None of our own cases have been cited, nor are we able to find any which are in any wise inconsistent with the views we have expressed. It should be said that it is open to some doubt whether the record before us fairly presents the principal questions argued by counsel. Except as it may be included within the scope of a general denial, the answer does not claim the benefit of the rule which exempts the employer from liability for negligence of an independent contractor, and quite likely it was not necessary to plead it specially. But no

request was made of the court to instruct the jury upon that theory, and the court submitted the case without objection upon the conceded general rule as to the requirement of reasonable care by the defendant to furnish plaintiff a safe place to work. We have thought it best, however, to take the case as counsel have argued it, and dispose of the points so raised according to our views of their merit.

We are of the opinion that the court properly submitted the cause to the jury with correct instructions as to the law bearing thereon, and the judgment appealed therefrom is therefore *affirmed*.

FRANK CECH v. CITY OF CEDAR RAPIDS, Appellant.

Municipal corporations: DRAINAGE OF SURFACE WATER: NUISANCE: INJUNCTION. A city has no right to drain surface waters flowing into its streets into an unnatural water course and so as to cast it upon adjoining lands in a materially larger quantity and in a different manner than it would naturally flow, and not in a natural water course; but it has no greater duty in this regard than a private owner would have in protecting adjoining lands from such injury. And in exercising its power to make its streets passable it may provide for the passage of surface water in drains or culverts through or under the streets, and if the method adopted is reasonably suited for this purpose an abutting owner can not complain that he has not been relieved of the burden of drainage to which his land was already subject, although the improvement operates to some extent to his detriment.

In this action to enjoin a city from maintaining a tile drain across one of its streets, the evidence is held to show that the same discharged the surface water into a natural depression on plaintiff's land, and that the only effect of the drain or culvert was to discharge the water directly onto plaintiff's land in a natural depression, instead of allowing it to spread over the highway before reaching his land, and does not therefore constitute a nuisance which the plaintiff is entitled to have abated.

Same: PRIOR ADJUDICATION. The finding of a jury in a prior action at law for damages, that the surface water was discharged

through a street culvert constructed by the city into a natural depression on the plaintiff's land, is conclusive on that question in a subsequent action by plaintiff to restrain the city from maintaining the drain.

Appeal from Linn District Court.—HON. F. O. ELLISON,
Judge.

TUESDAY, MAY 3, 1910.

ACTION to enjoin the defendant city from maintaining a drainage tile across one of its streets, which, as plaintiff alleges, collects and turns upon plaintiff's property a larger amount of surface water than would naturally flow thereon, and thus causes plaintiff permanent and irreparable injury. There was a decree for the plaintiff, finding the allegations of his petition to be true, and enjoining and restraining defendant from discharging the surface water upon plaintiff's premises through the tile drain as now constructed, and ordering defendant "to make a suitable provision for the water conducted across the street through the tile drain, so that the same may be taken care of without discharging it through said drain upon plaintiff's premises, and that, if said water can not be so taken care of, then said tile drain be closed or removed, so that the surface water shall not be concentrated and cast upon plaintiff's said land through said tile." From this decree the defendant appeals.—*Reversed.*

Redmond & Stewart and *Frank C. Byers*, for appellant.

Powell & Powell, for appellee.

McCLAIN, J.—Plaintiff's premises consist of four lots in a portion of the defendant city west of the Cedar River and alongside the highway which is on the east line of

the right of way of the Chicago, Rock Island & Pacific Railway Company. The land between the right of way and the river is low and flat, but west of the right of way is higher ground, from which surface water naturally flows to the eastward until it reaches the river. At a point in the railroad right of way immediately west of defendant's premises, a culvert was constructed under the track when the track was originally laid about fourteen years ago; this culvert serving the purpose of passing the water from the higher land to the west across the right of way in the highway adjoining it on the east; but, until the year 1904, there was no culvert or opening of any kind through or under the highway to carry off the water coming through the railway culvert, and, as a consequence, in time of rains the water discharged upon the highway through the railway culvert caused the formation of mud-holes rendering the highway almost impassable at such seasons. In March, 1904, one Kennedy, the street commissioner of defendant city, in response to complaints as to the condition of the portion of the street in question during wet weather, caused a twenty-four-inch tile to be laid diagonally across the street from the place where the water flowing through the railway culvert reached the street to the edge of the highway within a short distance of defendant's land which adjoined it. Soon after this tile was laid, there were very heavy rains, and the surface water flowing through this tile and coming upon plaintiff's land caused large excavations in the sandy soil and cut a ditch into which and through which the surface water still runs from time to time when there are heavy rains, causing portions of plaintiff's land to be unsuitable for tillage and especially for the purpose of truck farming, to which it has been appropriated by him. After passing across plaintiff's premises, such surface water accumulates in pools in another highway and on the land of other owners which lie in its general course toward the river, and plaintiff

alleges that these pools become offensive and a nuisance to the neighborhood.

It may be conceded that if the tile drain in question had the effect of collecting surface water and discharging it upon plaintiff's land in substantially larger quantities

and substantially in a different manner, and
1. **MUNICIPAL CORPORATIONS:** drainage of surface water; nuisance; in junction. in the case is as to the facts. No complaint is made as to the railway culvert, which, as already indicated, had been in existence for many years, and through which surface water from the higher land to the west was flowing in time of rains before plaintiff purchased land. The evidence shows that for three hundred or four hundred feet north from this culvert and for two hundred or three hundred feet south therefrom there is a natural slope toward the point where the tile is now laid in the highway, and it is not claimed that, in the absence of this tile, the water did not cross the highway and flow upon plaintiff's land and across his land in a general easterly direction towards the river, but plaintiff's contention is that, before the tile was constructed, the highway distributed the water more or less, so that it did not flow in any fixed channel, and did not cause a washing of the land, and that the discharge of the water through the tile has caused such washing, and continues to keep portions of plaintiff's land untilable. Under the evidence, it is clear that no more water is thrown upon plaintiff's land than would previously have flowed upon it coming as all of it must through the railway culvert; and, further, that the highway can not be kept in reasonably good condition for passing during wet weather, unless this water is carried across the highway by a culvert or drain, or the water is carried north or south along the highway to some other outlet than that available in accordance with the natural course of drainage. Therefore, as it seems to us,

the question is simply this: Has the city the right to maintain this street alongside of plaintiff's land in good condition by carrying the surface water which comes through the railway culvert across the highway in one place, instead of allowing it to form pools and mudholes in the highway, or, as an alternative, provide a ditch or sewer which shall entirely relieve plaintiff's land of this surface water by carrying it to some outlet which it has not heretofore had.

While a city has no right to improve its streets in such a negligent manner as to cause injury to an abutting property owner by throwing an unnecessary burden upon him or causing injury which he might have protected himself against if he had reasonable warning (*Hume v. Des Moines* (Iowa), 125 N. W. 846), it is unquestionably the right of the city to make its streets passable, and in doing so to provide for the passage of surface water in drains or culverts through or under them, and, if the method adopted is reasonably suitable for the purpose, the abutting property owner can not complain that he has not been relieved of a burden of drainage to which his land was already subjected, even though the improvement of the street operates to some extent to his detriment. The city certainly has no greater duty to care for surface water in the protection of property abutting on its streets than the private owner would have in protecting an adjoining owner from such injury. By statutory provision, now found in Code Supp., section 1989-a53, it is provided that "owners of land may drain the same in the general course of natural drainage by constructing open or covered drains discharging the same into any natural water course or into any natural depression whereby the water will be carried into some natural water course, and, when such drainage is wholly upon the owner's land, he shall not be liable in damages therefor to any person or persons or corporation." And in applying these statutory provisions it has been held

that the natural water course referred to is not necessarily a channel with banks, but, if the surface water usually flows in a given course within reasonable limits, the line of its flow is such a water course or natural depression as the statute contemplates. *Hull v. Harker*, 130 Iowa, 190. Now, it is shown by the evidence that prior to the construction of the tile drain across this street the water did flow over plaintiff's land in a depression which the witnesses referred to as a slight ditch, not so deep, however, as that the plaintiff could not plow across it, and it also appears that the water had already commenced to cut into the soil before the tile was laid. Indeed, we are not satisfied that the unusual flow of surface water due to exceptionally heavy rains soon after the tile was laid would not have excavated plaintiff's land in much the same manner as it was in fact excavated soon after the laying of the tile; for, as we understand the evidence, the cutting had already commenced, and it was likely in the course of nature to continue to plaintiff's damage, especially at times of excessive rainfall. There was no natural drainage for the water in any other direction or over any other portion of the plaintiff's land, and, as it seems to us, the only effect of the construction of the tile was to improve the highway and carry the water coming through the railway culvert directly upon plaintiff's land, instead of allowing it to spread over the highway before it reached his land. We reach the conclusion that the improvement of the highway was not in its nature unreasonable, nor made in a negligent manner, and therefore that the tile drain does not constitute a nuisance which plaintiff is entitled to have abated.

The decree of the lower court contemplates some other disposal by the defendant of the surface water coming through the railway culvert, but there is nothing in the evidence to indicate that any other disposal could be made, save by the construction of ditches or sewers which shall

take the water out of its natural course to some other outlet than that through which it has usually flowed, and there is nothing to indicate that any such disposition is reasonably practicable. We are not referred to any statute or rule of law which requires a city to protect property abutting on a street from the surface water which in the course of natural drainage flows upon or across it.

If we had any doubt under the evidence as to the fact that the water coming from the railway culvert naturally flowed across the highway and upon plaintiff's land

^{2. SAME: prior adjudication.} at the point where this tile drain is now laid, we should be compelled to adopt as conclusive on that question the finding of a jury in an action at law brought by this plaintiff against this defendant soon after the tile was laid and the ditches and holes in plaintiff's land were cut out, in which action plaintiff sought to recover damages for the injury to his property. In that action under proper issues, the trial court submitted to the jury the question whether prior to the laying of the tile drain in the highway the surface water from a territory west of the railway right of way was carried away by the ditch on the westerly side of the highway, and only that portion which overflowed said ditch came onto plaintiff's land in such manner as to cause it any damage, and whether the negligent and improper construction of the tile drain increased the flow of water and cast it upon plaintiff's land in a different manner, to his damage. The evidence in that action, as in this, showed the cutting of the holes and ditch in plaintiff's land after the tile was laid, and the court told the jury to find for the defendant, if the evidence showed that water had previously crossed the street and reached plaintiff's premises in its natural course at or about the place where the tile drain was constructed and no additional water was gathered up and cast upon plaintiff's land by said drain. The jury returned a verdict for the defendant, and thereby,

as we think, directly found that prior to the laying of the tile drain in the street the water did cross the highway at this place in its natural course and flow upon plaintiff's land. The judgment entered upon this verdict constituted, as we think, a final adjudication of the right of defendant to carry the water coming from the railway culvert across the highway by this tile drain.

We reach the conclusion that the lower court erred in its decree against the defendant, and such decree is therefore *reversed*.

**ROBERT FULLERTON ET AL. v. CITY OF DES MOINES ET AL.,
BARBER ASPHALT PAVING COMPANY, Appellant.**

Municipal corporations: STREET IMPROVEMENTS: ADVERTISEMENT FOR BIDS. In this action to enjoin the defendant city from paying a claim for a street pavement where it was contemplated that the new pavement should be laid upon the existing concrete foundation, and the advertisement for bids so stated and that the improvements were to be according to plans and specifications which required the old foundation to be brought to sub-grade, and that the new concrete necessary for resurfacing the old foundation be measured in a manner satisfactory to the city engineer, and that separate bids be made for new paving on the old foundation and for extra concrete, the advertisement sufficiently showed that the extra concrete was to be placed on the old foundation to bring it to subgrade.

Same: COMPENSATION FOR PUBLIC IMPROVEMENT: PRIOR ADJUDICATION. The fact that prior to the institution of this action to enjoin defendant from paying a claim for street improvement property owners had instituted actions to enjoin the improvement, on the ground that the street grade would be lowered by the proposed improvement, which actions were dismissed for the reason that the specifications for the new work required the contractor to bring the surface to subgrade as a part of the new improvement, did not go to the question of whether the contractor was to receive extra compensation for bringing the street to grade and were not an adjudication of that question in this action.

Same: COMPENSATION: EXTRAS. Where a contract for paving a street
3 with asphalt exacted first the laying of concrete on the old foundation
to bring the surface to subgrade, and provided that there
should be no compensation for extras, the laying of the concrete,
an essential portion of the work for which separate bids were
received, was not extra.

Same: CONTRACT FOR PUBLIC IMPROVEMENT: REFORMATION. Where all
4 the negotiations for paving a street on the old foundation with
asphalt, and bringing the foundation to subgrade with additional
concrete, were on the theory that the necessary concrete was not
determinable at the letting of the contract; that compensation
therefor should be fixed separate from that for laying the asphalt;
and the resolutions, proposals and specifications were in harmony
with such a course and bids were invited with the understanding
by all parties that separate prices were to be paid for grading
the foundation and laying the asphalt, but in making the con-
tract the intention of the parties in this respect was not expressed,
the court had power to reform the contract to give it the effect
intended; and it is no objection to such power that one of the
parties was a municipal corporation.

Same. A city may treat its contract for a public improvement as
5 already having been reformed to conform to the real intent of
the parties, and it may allow a claim for extra compensation
on such basis and thus avoid the expense of litigation incident
to the reformation.

Weaver and Sherwin, JJ., dissenting.

Appeal from Polk District Court.—Hon. W. H. Mc-
HENRY, Judge.

TUESDAY, MAY 3, 1910.

ACTION in equity to enjoin payment of a claim al-
lowed by the City Council of Des Moines in favor of the
Barber Asphalt Paving Company. Decree was entered as
prayed, and the paving company appeals.—*Reversed.*

Read & Read, for appellant.

Baily & Stipp, for appellee.

LADD, J.—The Barber Asphalt Paving Company entered into a contract with the city of Des Moines to lay asphalt pavement on East Fifth street and East Maple street. The work having been completed, the company received paving certificates in payment to the extent of \$1.40 per cubic yard, and presented its claim for resurfacing the old foundation as per its bid of \$4 per cubic yard for "extra concrete," alleged to have been furnished in the construction of the improvements, in the sum of \$3,492.40. This claim was investigated by a committee of the city council, and, upon favorable report, was allowed by that body. The plaintiffs are taxpayers of the city, and in this action seek to enjoin the payment of such sum on the ground that the city is not liable therefor, and its allowance was unauthorized by law. The streets had been paved with wooden blocks laid on concrete foundations, and, as the blocks had decayed, it was proposed to replace them with asphalt pavement on the same foundations. Prior to the removal of the blocks, definite information concerning the condition of the concrete below was not attainable, and, aside from the written matter hereinafter referred to, the record leaves no doubt but that the design of the board of public works and city engineer, as well as of the contractor, was that the \$1.40 per square yard to be paid for "sheet asphalt paving on the old concrete foundation" should not include the cost of resurfacing the old foundation with concrete so as to bring the pavement to the established grade. All so testify, and the work was prosecuted with that understanding. But appellees say the contract required the paving company to do all the work and furnish all the material at \$1.40 per square yard, and therefore such testimony, being contradictory of its terms, was not admissible; while the paving company contends that the evidence was proper to be considered as aiding in the interpretation of the agreement, and, in any event, in support of the cross-petition praying

for its reformation. To determine the issues, it will be necessary to refer to the proceedings somewhat in detail.

The resolutions of necessity were adopted September 8, 1902, and, in so far as material, declared that it was deemed advisable and necessary to make improvements by laying "an asphalt pavement" upon the present cement concrete one inch asphalt binder course, and one and one-half inches asphalt wearing surface, described the material to be used, and held the contractor to guarantee the pavement for seven years. The board of public works was directed to advertise for proposals and "enter into contracts for improving in the manner specified in said resolution of necessity as passed by laying an asphalt pavement upon the present cement concrete, one inch asphalt binder course and one and one-half inches asphalt wearing surface." The advertisement of the board of public works called for sealed proposals for the "improvements as per plans and specifications now on file in the office of the board," and in addition to the usual form provided that the pavement should "be laid on the present cement concrete foundation." The plans and specifications were printed, and such as were generally used for asphalt and other pavements in the city. They required: (1) That all bidders examine them carefully. (2) That all bids be made on the printed form furnished by the city. (3) That "bids must be made upon all the printed items not erased by the board of public works and city engineer from the printed proposal form, and the price so bid for such items shall include all material and labor necessary to make such items complete in the work." (4) That the street be brought up to grade by the city, the contractor to remove stones, earth and other materials which occupy the space to be filled by the pavement and put the street at subgrade "before any paving material shall be laid thereon." (5) That when old pavement was to be replaced, "removing such old pavement from the street, care shall be taken not to disturb or

injure the foundation. If such old paving be entirely removed, it shall be the duty of the contractor to bring the street to the proper subgrade and to a true crown according to the direction of the city engineer at the expense of the contractor." (6) That "The new concrete necessary for repairing or resurfacing old foundation shall be measured in boxes or barrows of a size and shape satisfactory to the city engineer or in any manner he may direct." (7) That "It shall be the duty of the inspector appointed by the city to keep a correct account of the amount of cement used and the square yards of concrete laid each day, and send his report daily to the board of public works." (8) That "All materials, machines, tools and labor necessary to fully complete the work shall be furnished by the contractor." (9) That "The contractor will be held responsible for the faithful execution of the contract, and in the interpretation and determination of questions which may arise concerning the meaning and intent of the plans and specifications, the measurements thereof, the decision of the board of public works and city engineer shall be final." (10) That "Any work not herein specified, but shown on plans, or *vice versa*, or which may be fairly implied as included in this contract, of which the board of public works and city engineer shall be judge, shall be done by the contractor without extra charge." (11) That "The measure of all paving laid shall be upon the basis of square yards actually paved." (12) That the asphalt surface "shall consist of a binder course of one inch in thickness and wearing course of one and one-half inches," and these shall be laid on a concrete foundation.

As a part of the specifications a form of proposal, such as was submitted to and accepted by the board of public works for each street save the descriptions bid, was, except price, as follows:

Proposal for Sheet Asphalt Pavement.

To the Board of Public Works of the City of Des Moines:

The undersigned hereby propose to furnish all the material, tools, machinery, and labor necessary for the construction of the sheet asphalt paving hereinafter designated, and to construct said sheet asphalt paving upon the streets or parts of streets indicated in the specifications on file in the office of the board of public works of the city of Des Moines and designated as . . . , in the city of Des Moines, Iowa, and to fully complete the same in accordance with the terms and conditions of the form of contract and specifications and plans for said improvements on file as above stated, under the direction and to the entire satisfaction of the said board of public works and city engineer of the city of Des Moines, at the following prices, to wit:

Sheet asphalt paving on old concrete foundation, per square yard	\$1.40
For extra concrete, per cubic yard.....	4.00
For any extra gravel, per cubic yard.....	1.40
For any extra sand, per cubic yard.....	1.20
For extra grading, per cubic yard.....	.27
For resetting old curb, per lineal foot.....	.10

It is to be observed that proposals were required on each item in the printed form of proposals, that when an old foundation was to be resurfaced to bring the pave-

I. **MUNICIPAL CORPORATIONS:** "measured in boxes or barrows of a size and street improvements: advertisement for bids. meaning and intent of the plans and specifications was to be determined solely by the city engineer and board of public works, who were also to determine what was included therein. Nothing in the plans and specifications, save as appears in above subdivision five, providing that bringing a street up to subgrade should be at the expense of the contractor, is contradictory to the interpretation given by the city officials, and that is neutralized by the circum-

stance that it relates to pavement on new, as well as old, foundations, and is immediately followed by a provision for measuring "new concrete necessary for repairing or resurfacing old foundation." Why measure this if it was not to be paid for according to measure? Looking through these several papers, bidders might well be in doubt as to whether proposals were to be received separately for resurfacing the old foundation with concrete and for the pavement proper, and the paving company was justified in calling on the board of public works and city engineer, whose decision would be final in the interpretation of all questions which might "arise concerning the meaning and intent of the plans and specifications," to ascertain how the proposals were to be made. He was advised that bids were being taken "on the binder and wearing surface," and also on the concrete put on the old foundation per cubic yard. His proposals were made accordingly. This is strongly confirmed by the circumstance that proposals were received by the board of public works at the same time for asphalt pavement with new foundation on East Twelfth street at \$1.975 per square yard, and on Walnut street at \$1.96 per square yard, and contracts let to the same company. This included laying a concrete foundation five inches deep, which, at \$4 per cubic yard, would cost \$.55 $\frac{1}{2}$, per square yard. In resurfacing and bringing East Fifth street to subgrade concrete averaging five and one-tenth inches deep was required at a cost computed at \$4 per cubic yard or \$.56 $\frac{3}{5}$ per square yard, and that required on East Maple street was three and three-eighths inches deep at a cost of \$.42 $\frac{1}{2}$ per square yard. So that the prices of the binder and wearing surface correspond with that exacted in paving on new foundations.

Up to the time of entering into the written contract, then, all parties understood that the paving company was to receive \$1.40 per square yard for laying the binder and wearing courses of asphalt, and \$4 per cubic yard for con-

crete used in resurfacing. The bid was made and accepted with that understanding, and both parties supposed this in accord with the resolutions of the city council, the advertisement of the board of public works, the plans and specifications, and the proposals, which, as seen, were subject to such construction. But it is said there was nothing in the proposal to indicate where or for what the "extra concrete" was to be used. The published proposal stated that the asphalt was to be laid "on the present cement concrete foundation." It also specified that the improvements were to be "as per the plans and specifications," and these required that the old foundation should be brought to subgrade; that the new concrete necessary for resurfacing said foundation "be measured in boxes or barrows of a size and shape satisfactory to the city engineer or in any manner he may direct," and that separate bids be made for "asphalt paving on old concrete foundation," and "for extra concrete per cubic yard." What was to be inferred from these provisions? Plainly enough that the "extra concrete" was that to be placed on the old foundation in bringing it to subgrade, and this was the interpretation of the city officials and the contractor when proposals were received, during the progress of the work and in the final settlement. It is impracticable to set out all the details in advertisements for bids, and for this reason, it is enough if bidders are referred therein to the plans and specifications on file. *Owens v. City of Marion*, 127 Iowa, 469; *Arnold v. City of Ft. Dodge*, 111 Iowa, 152. At least this is so in the absence of timely objection, and of any claim that fraud has been practiced. The proposal did not exact the form of the bids to be received, save by reference to the plans and specifications, and, as we think, that submitted was in accordance with the requirement therein prescribed.

Before the contract was executed, two abutting lot owners instituted separate suits against the city and the

paving company to enjoin the making of the improvements for that the grades of the streets would be lowered by laying the two asphalt courses on the old foundations, and no resolution or ordinance had been adopted changing the established grades. This was denied by the defendants therein, and on hearing the court dismissed the petition for the reason that the portion of the specifications set out in subdivision five above required the contractor to bring the surface to subgrade before the asphalt courses were laid. No issue relating to the price was involved in either case. Possibly one of the attorneys of the city exhibited the form of contract subsequently executed, but, if so, it was merely as indicating an intention to bring the street when paved to the established grade. The record is void of evidence that any one was misled thereby, and, as the adjudication did not touch the matter of cost, they do not sustain the plea of estoppel interposed by plaintiffs. But for the terms of the contract, then, there could be no doubt as to the liability of the city for the payment of the concrete laid in resurfacing the old foundation.

The formal contract was executed October 22, 1902. Section 866 of the Code required this to be prepared by the city solicitor, and made by the board of public works with

the lowest responsible bidder. Section 867, 3. SAME: compensation: extras. Code. And before the work is done a certified copy of the contract must be filed with the city clerk. Section 812, Code. But the conditions of the contract are necessarily determined by the resolution of necessity, as required by section 810 of the Code, the ordinance or resolution directing the improvement (section 811, Code), the plans and specifications adopted therefor (sections 666, 865, 868, Code), and the published proposals and bid submitted. Had they been so drawn, there would have been no occasion for this controversy. Instead, by its terms the contract seems to exclude any compensa-

tion for the extra concrete placed on the old foundation to bring it to subgrade. It first recites that the paving company

agrees to furnish at its own expense all necessary material and labor and to construct the improvements herein-after designated in a thorough, substantial and workman-like manner and in strict compliance with the requirements of its contract and of the specifications and plans. . . . Paving East Fifth street from the north line of Grand avenue to the south line of Maple street about four thousand eight hundred and fifty-six square yards, or more or less of asphalt pavement. The party of the first part shall begin said work at such point as the board of public works may direct and shall conform to the directions of said board as to the order in which the several parts of this work shall be done and the mode of performing the same. [Like clauses relating to East Maple street are included.] . . . The party of the first part further agrees to perform said work in strict accordance with this contract and with the plans and specifications hereinbefore referred to, at the price one dollar and forty cents (\$1.40) per square yard, which shall be in full compensation for the cost of the entire work, and the city of Des Moines shall not be liable to said party of the first part for extras of any kind or for any damage which he may sustain by coming in contact with rock, sand, water, or any unforeseen obstacle or material, it being expressly understood that the contract price above specified shall be in full for all work done under this contract.

Appellant contends that this contract should be construed as having reference to the two courses of asphalt only. If so, the laying of the concrete and cost thereof could not have been included therein. Yet by its terms the improvement is to be in a workmanlike manner and according to the specifications, both of which would be impossible without resurfacing the old foundation. Moreover, the price named is fixed as "full compensation for the cost of the entire work," and "in full for all work done under this contract." When fairly construed, it

can not be said that the contract does not include everything to be done in the making of the improvements contemplated. The contract, like the plans and specifications, appears to be a stock form made use of generally in the prosecution of the work of improving the city thoroughfares, and probably was not selected or prepared with reference to the pavements in question. As seen, it expresses the intention of neither party in the matter of compensation. That portion of the bid for extra concrete necessary to bring the old foundation up to subgrade is entirely omitted. True, a clause excluded compensation for "extras" of any kind, but this, as the context clearly shows, had reference to "extras" in the ordinary sense, and not to an essential portion of the material and labor for which separate bids had been taken. Ordinarily, according to the lexicographers, the word carries the idea of something beyond, in addition to, or in excess of, what is due usually or necessarily. And in a contract it denotes something done or furnished in addition to, or in excess of, the requirements of such contract; something not required in the performance of the contract. *Shields v. N. Y.*, 84 App. Div. 502 (82 N. Y. Supp. 1020); *Casgrain v. Milwaukee*, 81 Wis. 113 (51 N. W. 88).

As seen, laying of the concrete was exacted by the terms of the contract, and was in no sense "extra," though so designated in the bid submitted to the board of public

works. We have then this situation: All the preliminary negotiations proceeded on the theory (1) that the amount of concrete necessary to bring the old foundation

to subgrade was not ascertainable prior to letting the contract; (2) that compensation therefor should be fixed separate and apart from that of laying the two courses of asphalt and in a way to obviate payment for more than required; (3) that the resolutions, proposals, and specifications were in harmony with such a course;

4. SAME: contract for public improvement: reformation.

and (4) the bids were exacted with the distinct understanding of all parties that separate prices be paid for the asphalt courses and for resurfacing the old foundation with concrete separately, but in the preparation of the contract subsequently executed the intention of the parties, as thus manifested, was not expressed. That in such a case a court of equity will intervene and reform the instrument so as to give effect to what was intended is no longer an open question in this state. *Nowlin v. Pyne*, 47 Iowa, 293; *Reed v. Root*, 59 Iowa, 359; *Lee v. Percival*, 85 Iowa, 639. That one party is a municipal corporation can make no difference. It should conform to its contracts as actually made precisely the same as private corporations or individuals. It has had the advantages accorded by statute of prescribing the character of the improvements to be made, and of competition in the costs of construction. Every statute relating thereto has been complied with save that the preliminary proceedings have not been fairly represented or embodied in the written agreement. A city has no more right to avail itself of an unconscionable advantage to a mistake of this kind than an individual or private corporation, and its agreements are quite as susceptible to reformation, unless some statute be in the way.

Evidently this was the view taken by the city council, for in allowing the paving company's claim, it treated the contract as though reformed to represent the agree-

s. SAME. ment as made. The city had the right to do this, and thereby avoid the litigation incident to the reformation of the contract. As seen, the claim was just, and was rightly allowed from the general fund. *Shelby v. Burlington*, 125 Iowa, 343; *Ottumwa B. & Co. v. Ainley*, 109 Iowa, 391; *Corey v. Ft. Dodge*, 133 Iowa, 666. While ordinarily claims of this kind are the subject of just suspicion, and are to be scrutinized cautiously, yet when meritorious, as this one is demon-

strated to have been, the city officials are to be commended for their prompt and full adjustment.

A decree dismissing the petition should have been entered.—*Reversed.*

WEAVER, J. (dissenting).—For reasons quite fully set forth by me in an opinion filed upon the original submission of this case, and reported in 115 N. W. 607, I dissent from the conclusion now reached by the majority. Without burdening this dissent with a repetition of the statement and discussion there found, I have only to say that I am still satisfied with the correctness of the decision there announced, and must therefore decline to follow the court in receding from what I deem a sound position to one which it must ultimately abandon if we are to have any effectual safeguard against grave abuses in the matter of contracts for the construction of municipal improvements. In the case before us the contracting company, presumably by underbidding its competitors, secured the award of a job for constructing a large amount of paving. When the work was done it asked, and the city council allowed to it, compensation far in excess of the sum for which it had specifically and expressly undertaken to perform the work. That action the majority opinion approves and upholds, on the theory that, while the contract as executed by the parties is precisely what the plaintiff asserts it to have been, it did not in fact embody their mutual understanding as to the compensation to be paid and the basis of its computation. If this is to be the rule, what is the use of having any contract? What indeed is the use of enacting statutes for the protection of the taxpayer, if a contractor by underbidding may shut out his competitors, and then demand and receive in excess of the contract price whatever the city council in its liberality may see fit to concede to him? What guaranty is left for fair competition in the letting

of contracts? How are the property owners and taxpayers to know what burdens are being placed upon their shoulders until it is too late for adequate redress? I am not saying or in any manner suggesting that fraud or intentional wrongdoing is involved in this particular case, but I do say that the system to which we here give our approval is inconsistent with the spirit and purpose of our laws regulating the conduct of municipal business, and that by loosening the tension of legal restraint it tends to make fraud both easy and profitable.

In my judgment the decree appealed from should be affirmed.

SHERWIN, J., concurs in the foregoing dissent.

J. K. BARNES and M. H. SCHUSSLER, Appellants, v. CENTURY SAVINGS BANK ET AL., Appellees.

Pleadings: WAIVER OF OBJECTION. Any error in ruling upon a motion to strike, or for a more specific statement, is waived by an amendment to the pleading objected to.

Appeal: EXCEPTION TO RULINGS: REVIEW. The appellate court will not consider rulings made upon the trial to which exception has not been duly taken.

Pleadings: MOTIONS: ORAL ARGUMENT. Counsel have no absolute right to orally argue a matter which is for the consideration of the trial court; and failure to give opportunity for oral argument in resistance to a motion to strike, or for a more specific statement, is not reversible error.

Same: APPEAL. As a rule an appeal will not lie from a ruling on a motion to strike, or for a more specific statement.

Appeal from Polk District Court.—Hon. W. H. McHENRY, Judge.

TUESDAY, MAY 3, 1910.

ACTION to cancel certain notes given by plaintiffs to defendant bank, and to secure the return of certain securities deposited by them. Defendants filed motions to strike and for more specific statement, which were sustained, and also filed a counterclaim or cross-petition. From the rulings on the motions, plaintiffs appeal.—*Affirmed.*

W. T. Maxey and H. G. Gearhart, for appellants.

Dale and Harviston, for appellees.

DEEMER, C. J.—Plaintiff Schussler has dismissed his appeal since the case came to this court, and, so far as he is concerned, there is nothing to consider.

Barnes' appeal is from rulings on a motion to strike parts of his petition and for more specific statements therein. The exact nature of the case need not be considered. Suffice it to say that it is an action to secure the cancellation of certain notes given by plaintiff to the defendant bank, and to secure the return of certain securities deposited with the bank as collateral to these notes. Defendant filed a motion to strike parts of the original petition and for a more specific statement in other parts. This motion was submitted, and the trial court made the following order thereon: "Sustained. It is hereby ordered that defendant be given ten days in which to plead." Thereafter and on October 15th plaintiffs filed an amendment to their petition, evidently intending to conform to the rulings of the trial court on the motions; and to this amendment defendant filed another motion to strike and for a more specific statement, etc. This motion was based, among other things, upon misjoinder of parties defendant. The motion had many specifications and was submitted to the court on January 19, 1909, resulting in the following order: "This cause comes on this day for hearing on motion to strike and make more specific statement, and the

court, being fully advised in the premises, sustains same as to paragraph 1, the first half of paragraphs 2, 3, the first half of paragraph 4; all of 5-A, 6-A, 7 and 8. Ten days from January 30, 1909, to amend or replead." On January 23, 1908, defendant filed an answer and counter-claim. Instead of amending or repleading, as authorized in the order of January 19th, plaintiffs perfected an appeal to this court by serving defendant with notice of appeal on February 6, 1909.

I. From this recitation of the record it will be observed that plaintiffs did not except to the rulings on the motions. On the contrary, after the first order was made, they filed an amendment to their petition, thus waiving any error in the ruling on the first motion, especially in view of the fact that no exception was taken to the ruling when made or afterwards.

Again, the ruling on the second motion to strike etc., was not excepted to. In view of this record there is nothing for us to consider. The universal holding of this court has been that we will not consider any ruling of the trial court to which an exception is not duly taken. *Beason v. Jon-
ason*, 14 Iowa, 399; *Eason v. Gester*, 31 Iowa, 475; *Rich-
ards v. Hintrager*, 45 Iowa, 253; *Cain v. Story*, 15 Iowa, 378; *Carter v. Griffin*, 54 Iowa, 62; *Scott v. Neises*, 61 Iowa, 62; *Powers v. O'Brien*, 54 Iowa, 501; *Hodgin v.
Toler*, 70 Iowa, 21; *Fink v. Mohn*, 85 Iowa, 739; *Spelman
v. Gill*, 75 Iowa, 717.

II. Appellants complain of the fact that the trial court did not permit oral argument upon the motions, but took up and ruled upon the motions without notice to appellants' counsel. These facts do not appear in the record; but, if they did, they would not be ground for reversing the orders of the trial court. The statute does not give attorneys

1. PLEADINGS:
waiver of
objection.

2. APPEAL: ex-

ception to

rulings: re-

view.

3. PLEADINGS:
motions: oral
argument.

the absolute right of oral argument upon any matter which is for the consideration of the trial court.

III. Plaintiffs' right to appeal would in any event be very doubtful, even had he a record which we might consider. He was given the right to amend or replead, ^{4. SAME: appeal.} and as a rule an appeal will not lie for a ruling on a motion to strike and for a more specific statement. *Allen v. Church*, 101 Iowa, 116; *Chamberlain v. Brown*, 144 Iowa, 601; *Bank v. Dutcher*, 128 Iowa, 413; *State v. D. M. R. R. Co.*, 135 Iowa, 694. However, as plaintiffs took no exception to the rulings complained of, they are not in a position to challenge them.

The rulings must, therefore, be, and they are, *affirmed*.

HEWITT & HOSIER, Appellants, v. NORMAN LICHTY MFG. Co.

Contracts of agency: FRAUD: CONCEALMENT OF FACTS BY AGENT: EVIDENCE. An agent is bound to disclose to his principal every material fact relating to the business intrusted to him. In this action by advertising brokers for commissions it is held, that the giving of secret premiums by plaintiffs to procure the publication of defendant's advertisements, which were not contemplated by the contract with defendant, amounted to a breach of good faith and deprived defendant of the material advantage relied upon and inducing the contract, and that plaintiffs were therefore not entitled to recover commissions.

Appeal from Polk District Court.—HON. JAMES A. HOWE,
Judge.

TUESDAY, MAY 3, 1910.

PLAINTIFFS sue to recover commissions for acting as agents of defendant in procuring the insertion in one

hundred newspapers of advertisements of "Diners Digesters," a remedy for dyspepsia and indigestion manufactured by defendant, at the agreed commission of \$3 for each newspaper in which the insertion of such advertisement was procured, and the additional sum of twenty cents each for electrotypes furnished to the publishers of such papers for insertion. The defendant admitted the making of the contract with plaintiffs for such commission, but denied its performance, and alleged fraud and concealment on the part of plaintiffs rendering the contract void. At the conclusion of the evidence offered on each side, the court on defendant's motion directed a verdict in its favor, and from judgment on this directed verdict plaintiffs appeal.—*Affirmed.*

Dunshee & Haines, for appellants.

Read & Read, for appellee.

McCLAIN, J.—The negotiations between the parties leading up to the contract for commissions on which plaintiffs sue commenced with the sending of a circular letter by plaintiffs to defendant exploiting a scheme for securing the insertion in newspapers of advertisements of defendant's manufactures, to be paid for by duebills of defendant issued to the publishers of the newspapers inserting the advertisements, by which duebills the defendant should promise to deliver to the publishers for each advertisement specified quantities of defendant's manufactures for a cash price to be paid, which was much less than the price at which the article was offered on the market. The material parts of this circular were as follows:

We become a part and parcel of your business when you engage us, interesting ourselves in the making of actual sales—working in harmony and enthusiastically with your selling force. . . . The manufacturer is supposed

to offer each publisher a limited amount of goods for which the manufacturer agrees to accept as pay for same part cash and part advertising, the cash amount to be a sufficient sum to cover the cost of goods offered, and the difference between the cash amount charged and regular retail price of the goods to represent the six months' advertising. . . . It is an admitted fact that publishers are always anxious to procure additional advertising, but nowadays it is not an easy task for them to fill the columns of their papers with cash advertisements; consequently they are placed in a position where they look favorably on our duebill proposition which we will admit calls for some extra work on their part in trying to find a buyer for the goods offered. But through us they procure a lot of business that they wouldn't get in any other way. We know in many instances where publishers have made more money on our duebills than they received for the same amount of space payable in cash. The publisher makes the best kind of salesman, as he is acquainted with every dealer and individual in his section, and being backed by his paper, he has considerable influence that a traveling salesman does not possess. . . . In order to introduce them [your goods] would you not be willing to offer a limited amount of such goods and agree to accept as pay part cash and part advertising? The cash amount that you name is supposed to be a sufficient sum to cover the cost of the goods offered, also our commission which we charge the manufacturer for our services. . . . The day is past for creating a demand for goods by newspaper advertising alone; by our duebill method the manufacturer has in addition to his advertising being inserted regularly for a term of six months the publisher acting the part of his representative and the goods offered for sale in the town which makes success assured, as they work hand in hand together. We attend to everything by taking upon our own shoulders all the labor and trouble involved. We design advertisements, and print the duebills. We mark, check, and attend to each advertisement during the period it runs, and keep records and papers at our office for inspection.

The defendant entered into correspondence with the

plaintiffs as the result of the receipt of this circular, and gave information on which the advertisements should be framed and the duebills drawn, and signed a contract by which it authorized plaintiffs to procure for it the insertion of advertisements in any number of country newspapers, not to exceed one hundred, for a period of six months, for which it agreed to pay to the publishers in duebills such as have already been described and to the plaintiffs for services and expenses a cash commission or fee of \$3 for each paper in which plaintiffs procured the insertion of the advertisement, together with a contract (as per attached sheet) signed by each publisher. By this contract the defendant also authorized plaintiffs to furnish all necessary electrotypes, one for each paper, for which it agreed to pay twenty cents each. By express stipulation the specified fee or commission and the specified expense for electrotypes were together to constitute all the consideration which defendant was to pay plaintiffs for services, expenses, and electrotypes under the contract; the plaintiffs guaranteeing that defendant should have no liability to pay any further consideration than mentioned in the contract, and assuming full responsibility should any demands be made by any publisher in excess thereof, except only in the event that the defendant should refuse to issue, honor, or accept the duebills above described.

Within a few months after this contract was entered into, plaintiffs submitted to defendant, as they alleged, copies of one hundred papers in which defendant's advertisement was contained and contracts signed by the publishers of such papers, in which the publishers agreed to continue the advertisement of defendant according to the duebill plan, and demanded payment for their services and for expenses of electrotypes in the sum of \$320. Although defendant denied in its answer the performance by plaintiffs of their obligations under the contract, there

was sufficient evidence to go to the jury in support of the allegation that the contract was performed and the amount claimed was due, unless plaintiffs were to be denied recovery on the ground of fraud and concealment as alleged in defendant's answer. The fraud and misrepresentation, if any, consisted in the fact that the publishers relied for their compensation, not upon the duebills issued to them which involved cash payments for defendant's manufactures at greatly reduced rates which the publishers should sell in order to realize a compensation for the insertion of the advertisements as well as a return of the money paid under the duebills, but upon certain premiums which plaintiffs admitted were, without the knowledge of defendant, and without any reference thereto in their circular or letters, offered to the publishers of papers in which advertisements were inserted in pursuance of their scheme. These premiums, according to the testimony for plaintiffs, consisted of fountain pens, numbering machines, clocks, lamps, etc., which cost them on an average not more than sixty-five cents for each advertisement, and which were not received by the publishers as payment for such advertisements, but for the purpose of having the publishers take proper care of the electrotypes furnished them for insertion and for their trouble and expense in sending to plaintiffs a copy of each issue of the paper containing said advertisement. One of the publishers, however, who inserted defendant's advertisement under a contract such as above described, testified that he was to receive for thirty advertisements similar to those contracted to be inserted for defendant a premium consisting of an Oliver typewriter, and that, while the consideration he received from defendant consisted of duebills, he had never used the duebills, but still had them on hand. It was shown, also, that at the time of the trial, which was more than a year after the duebills had been issued by the defendant to the various publishers of its advertisements, not a single

duebill had been returned to it for the purpose of procuring its manufactures at the reduced rate provided for in accordance with the scheme by which the publishers were to realize their compensation by taking defendant's manufactures at a greatly reduced cash price and realize the amount paid and the compensation for the advertisement out of the sale of such manufactures.

We think, therefore, that the evidence conclusively showed that the publishers inserted defendant's advertisements, not in consideration of the privilege which was given them under the duebills, but in part consideration at least of premiums or other inducements offered to them by plaintiffs without defendant's knowledge and not contemplated in the contract, and the only question which we have to determine is whether this fact showed fraud and concealment on the part of plaintiffs such as to defeat their right to recover their compensation.

It plainly appears that plaintiffs were the agents of defendant for the purpose of procuring advertising, and that they led the defendant to believe that under the duebill plan the publishers would be entirely dependent for payment for the advertisements upon selling defendant's manufactures, which they would have the privilege of buying at greatly reduced rates for cash. As a matter of fact, it was not the purpose of plaintiffs to procure the insertion of advertisements for defendant on this sole consideration; but their plan was to procure publishers to insert such advertisements at least for the part consideration of compensation to be given by way of premiums offered by plaintiffs, and the fact that no duebills were ever presented by publishers for defendant's advertisements would, as it seems to us, conclusively show that the consideration in fact relied upon by the publishers was the advantage of the premiums offered by plaintiffs.

The excuse given by the members of plaintiffs' firm, as witnesses, for offering premiums to secure the pres-

ervation of the electrotypes and the forwarding to plaintiffs of copies of each issue of the paper in which the advertisement appeared, was plainly a mere subterfuge. Plaintiffs had not obligated themselves as defendant's agents to care for the electrotypes procured at defendant's expense, nor to see to it that the advertisements appeared in the subsequent issues of the paper. These matters were covered by the contract between the publisher and the defendant which plaintiffs procured, and their entire duty in the matter had, according to their own theory, been discharged when they presented to the defendant a copy of the first issue of the paper containing the advertisement and the contract of the publisher to continue such advertisement for six months.

The arrangement which plaintiffs had with the publishers to give them premiums which should serve at least as part compensation—and we think it conclusively appears as sole compensation—for the insertion of the advertisements, was calculated to defeat the material inducement held out to defendant for entering into the arrangement, which was that they should be able to sell to the publishers at a reduced cash price quantities of their manufactures, which should be put on the market by the publishers and thus make known to the public the merits of such manufactures, and create a demand for them which would bring additional business to the defendant. It is clear, without further argument, that, in thus depriving the defendant of a material advantage relied upon by it, the plaintiffs acted in hostility to defendant's interests and were guilty of a fraudulent concealment. An agent owes to his principal the utmost good faith, and is bound to disclose to him every material fact relating to the conduct of the business intrusted to him.

The facts, as we find them on the record, bring the case clearly within the reasoning adopted in *Allen v. Pierpont* (C. C.), 22 Fed. 582, and *Hoffin v. Moss*, 67 Fed.

440 (14 C. C. A. 459), cases involving advertising schemes of substantially the same character as that proposed by plaintiffs to defendant. It is true that in those cases the decisions were upon demurrer to defendants' answers setting up fraud and concealment, but in the case before us there is no material evidence which would have justified a finding by the jury that fraud and concealment were not shown as alleged in the answer.

The judgment of the trial court is therefore *affirmed*.

CHARLES M. ROYER, Plaintiff, v. KING'S CROWN PLASTER Co., Appellant, and the TRAVELERS' INSURANCE Co., Defendants.

New trial: DISCRETION: REVIEW. The appellate court is slow to
1 interfere with an order granting a new trial, in view of the trial court's discretion in that regard; and the mere fact that a party was not entitled to a new trial because there was no prejudicial error, and because on the whole record the other party was entitled to a directed verdict, will not necessarily require a reversal of the order.

New trial: INCONSISTENT INSTRUCTION. An instruction which is in-
2 consistent with itself is presumptively prejudicial and is sufficient to justify the court in granting a new trial.

New Trial: REVIEW. The appellate court will not set aside an order
3 for a new trial made after a verdict for defendant, because of instructions prejudicial to plaintiff, on the ground that the court also erred in not directing a verdict for defendant; as both errors taken together would not render each nonprejudicial.

Appeal from Cedar Rapids Superior Court.—Hon. JAMES H. ROTHROCK, Judge.

TUESDAY, MAY 3, 1910.

THIS is an action for damages for personal injuries.

There was a verdict for the defendants. Upon motion of the plaintiff, the trial court awarded a new trial. Defendants appeal.—*Affirmed.*

Dawley & Wheeler, for appellants.

Barnes & Chamberlain, for appellee.

EVANS, J.—The defendant is a corporation and the plaintiff was one of its employees. On March 18, 1907, the plaintiff was injured to some extent by the fall of a low scaffold. The jury rendered a verdict for the defendant. Upon motion of the plaintiff, the trial court awarded him a new trial. From such order awarding a new trial the defendant has appealed. The contention of the defendant in argument is that there was no error in the record prejudicial to the plaintiff, and therefore he was not entitled to a new trial. Defendant further contends that upon the whole record the defendant was entitled to a directed verdict. If both of these contentions of the defendant were conceded, it would not necessarily entitle it to a reversal of the order of the trial court. If the trial court had refused a new trial and the plaintiff were here as appellant, then the contention of the defendant would be quite conclusive if supported by the record.

I. But some latitude of discretion is conferred upon the trial court in the matter of granting a new trial, and we can not interfere with it unless an abuse of discretion

be shown. This court has often admonished
1. **NEW TRIAL:** the trial court of its duty to exercise such
discretion candidly and fearlessly, and it
review.
has always been reluctant to interfere with an order granting
a new trial. *Kern v. May*, 92 Iowa, 674; *Dewey v.*
Railroad Co., 31 Iowa, 373.

II. Plaintiff's motion for new trial contained thirty-seven grounds. The trial court sustained it without in-

dicating the ground or grounds of such sustaining order further than to find that the verdict was not contrary to the evidence. It is contended for the defendant that there was no error in any ruling on the admission of testimony, and that there was no error in any instruction. It is sufficient answer to this to call attention to instructions Nos. 4 and 5, which are as follows:

2. NEW TRIAL: inconsistent instructions. If you find from the evidence that defendant did not exercise ordinary care to cause the scaffold to be supported, so that it would be reasonably safe for the purposes for which it was intended, then you are to determine from the evidence whether or not the defendant was negligent in failing so to do. And, in determining this question, you should take into account the character of the work to be done, and, if from that and all the circumstances shown in the evidence you believe that the defendant exercised such care as a person of ordinary care and prudence would have exercised under like or similar circumstances, then upon this charge of negligence your finding should be for the defendant.

Instruction No. 5. The next charge of negligence as made by the plaintiff is that the defendant was negligent in failing to employ skilled workmen in the building of the scaffold. If you believe from the evidence that the defendant did not fail to employ skilled workmen in the building of the scaffold, then you will pursue this inquiry no further, but will find for the defendant upon this charge of negligence. If, on the other hand, you find from the evidence that such charge of negligence is sustained by the greater weight or value of the evidence, then you are to determine whether or not this was negligence upon the part of the defendant. And in so determining you should consider the character of the work to be done, the kind of men employed, and, if in employing workmen for the construction of the scaffold you believe that the defendant did that which a person of ordinary care and prudence would have done under like or similar circumstances, then your finding upon this charge of negligence should be for the defendant.

Each of these instructions was manifestly erroneous, in that each was inconsistent with itself. In the fourth instruction the jury was told: "If you find from the evidence that the defendant did not exercise ordinary care, . . . then you are to determine from the evidence whether or not the defendant was negligent in failing so to do. . . . And, if you believe that the defendant exercised such care as a person of ordinary care and prudence would have exercised, . . . then upon this charge of negligence your finding ought to be for defendant." To put it briefly, the jury was charged that, if it found that the defendant did not exercise ordinary care, it should then determine whether it did exercise ordinary care, and, if "yea," then the finding should be for the defendant. It is manifest that through some oversight or possibly clerical error the trial court did not express what was in his mind. Instruction 5 is subject to a similar criticism. The jury was therein told that, if it finds that "such charge of negligence is sustained," "then you are to determine whether or not this was negligence." These instructions were presumptively prejudicial, and on their face furnished a sufficient ground to justify the trial court in awarding a new trial.

III. It is urged by defendant that it was entitled to a directed verdict at the close of the evidence, and that the plaintiff could not therefore be prejudiced by any error in the instructions. We are quite clear that this question can not be considered upon this record. Inasmuch as a new trial must be had, we will intimate no opinion as to the sufficiency of the evidence appearing in the present record to sustain a finding for the plaintiff. The jury found for the defendant. The plaintiff filed a motion for new trial. He pointed out many alleged errors as grounds for such trial. As already indicated in the preceding paragraph, some of these grounds were clearly

3. NEW TRIAL:
harmless
error.

valid. On its face, therefore, the plaintiff's motion for a new trial presented proper grounds for such relief. The trial court sustained such motion. The contention urged by the defendant at this point is that the court should have overruled such motion notwithstanding that valid grounds for a new trial appeared therein, because the court had previously erred in the course of the trial in overruling the defendant's motion for a directed verdict. This is a plea of offset of one error against another, on the theory that both errors taken together rendered each error nonprejudicial. Assuming that such a course would be proper in some cases, we would adopt it more readily for the purpose of saving the action of the trial court than for the purpose of reversing it. *Vorhees v. Arnold*, 108 Iowa, 85-86; *Wallace v. Wallace*, 137 Iowa, 37. We are clearly of the opinion that such a course is not available to the appellant on the record in this case for the purpose of reversal of the order granting a new trial.

The order of the trial court is therefore *affirmed*.

EUNACE CURRIE v. CONTINENTAL CASUALTY COMPANY,
Appellant.

Insurance: LIMITATION OF LIABILITY: "BEYOND SEAS." A policy of insurance limiting liability to injuries received within the United States, Mexico and Canada, and excluding parts of the United States beyond the seas, does not include liability for injury and death of insured in the Canal Zone on the Isthmus of Panama; as the Canal Zone is beyond seas within the meaning of the policy in suit.

Same: WAIVER: EVIDENCE. A waiver is the intentional relinquishment of a known right, and any conduct relied upon which warrants the belief that a right has been relinquished constitutes a waiver in law; and the question of waiver is usually one of fact. In this action the questions of whether the policy sued upon was absolutely canceled, and whether the provision therein limit-

ed liability for injuries to places within the United States, is held under the evidence to be for the jury.

Appeal from Wapello District Court.—Hon. D. M. ANDERSON, Judge.

TUESDAY, MAY 3, 1910.

SUIT on an accident insurance policy. There was a directed verdict for the plaintiff. The defendant appeals.—*Reversed.*

Manton Maverick and McNett & McNett, for appellant.

Jaques & Jaques, for appellee.

SHERWIN, J.—In December, 1905, the defendant issued to Eben Currie, husband of the plaintiff, an indemnity policy in the sum of \$1,000. At the time the policy issued the insured was a resident of Wapello County, Iowa, and the policy contained the following clause: "This policy covers only injuries received within the United States (not including its parts beyond the seas), Mexico and Canada." In June, 1906, Mr. Currie accepted a position as a locomotive engineer in the engineering department of the Isthmian Canal Commission, and soon thereafter went to the Isthmus of Panama and took charge of a railroad engine in the Panama Canal Zone, where he was killed in a collision in September, 1906. Mr. J. G. Sorenson was the defendant's agent who took the application for the policy, and after the deceased had gone to the Canal Zone he and the plaintiff herein had some talk with reference to the policy, the substance of which, it may fairly be inferred, was communicated to the deceased in a letter from the plaintiff. On the 27th

of July, 1906, the insured wrote to the defendant as follows: "Empire, July 27, 1906. Continental Casualty Company, Chicago, Ill.—Dear Sirs: I have been notified that my policy No. 1008021 is not of any good to me while I remain on the Isthmus of Panama. Mr. Sorenson wrote my wife at Eldon, that my policy was no use to me, as they were a clause in the policy that covered it. Now, if I have paid for something that is of no benefit which you received the last payment out of May pay, I will expect you to remit balance due the part of the year from date of notice to my wife, as I expect to stay here this year. Please let me have reply soon as I don't care to pay out money for nothing. Yours fraternally, Eben Currie. Add. Eben Currie, Empire Canal Zone, Isthmus of Panama. Please remit to Mrs. Eunace Currie, Eldon, Iowa." On August 11, 1906, the defendant wrote the insured as follows: "This company is in receipt of your favor of the 27th inst., asking for cancellation of policy 1008021. If you will present the policy at this office or send it here, it will be canceled and refund of premium will be made as provided in the short rate rider attached to it." Nothing more was done by either party before the death of Mr. Currie.

The appellant contends that the policy was not in force at the time of the death of the insured because he was then not "within the United States" within the meaning

i. INSURANCE: of the clause in the policy from which we limitation of have already quoted, and because he was liability: "beyond seas." then "beyond the seas" within the meaning of those words as used in the policy; and, further, for the reason that the insured had canceled the policy in his letter of July 27, 1906. On the other hand, the appellee insists that the deceased was not without the United States or beyond seas when he was killed, and that, if he was, the defendant waived that provision of its policy by its letter of August 11th, and by its subsequent action.

We think there can be no serious question as to the construction that should be given the clause of the policy limiting the territorial liability. It says in so many words that it covers only injuries received "within the United States not including its parts beyond the seas." If it be conceded that the Panama Canal Zone is in any sense a part of the United States, we think it must still be said that it is "beyond the seas," within the meaning of that term and within the meaning of the language of the policy. Had the limitations been to the United States alone, a more difficult question would have been presented. The additional statement that the policy did not cover any part of the United States beyond the seas, and did cover Mexico and Canada, clearly excludes the Canal Zone on the Isthmus of Panama. It excluded all parts of the United States beyond the seas as the term would be literally construed. The term "beyond the seas" has been construed to mean different things, depending upon the evident intent of the users thereof. Thus in statutes of limitation containing an exception in favor of persons "beyond the seas" it has been held to mean "beyond or without the United States." *Davie v. Briggs*, 97 U. S. 628 (24 L. Ed. 1086). The term as used in a statute of wills was construed in like manner. *Mason v. Johnson*, 24 Ill. 159 (76 Am. Dec. 740). It has also been held to mean without the state. *Whitney's Lessee v. Webb*, 10 Ohio, 513. In England the term is understood to mean out of the realm of Great Britain, including England and Scotland. In Maine the term as used in a statute providing a penalty for transporting a minor out of the state to parts "beyond the seas" without the consent of his parents, etc., means some foreign part or place, and not merely another state. See, also, *Whitney v. Goddard*, 37 Mass. 304 (32 Am. Dec. 216). These decisions are not of special help in the instant case, however, for the reason that each contract or statute must be construed

according to its own language, and, as we have already said, we are of the opinion that the policy in question should be construed to exclude the Isthmus of Panama. The legal territorial status of the Canal Zone presents an interesting question that we need not now decide. But the Articles of Treaty between the United States and the Republic of Panama and the following decisions leave little room for doubt on the subject: *Downes v. Bidwell*, 182 U. S. 244 (21 Sup. Ct. 770, 45 L. Ed. 1088); *Rasmussen v. United States*, 197 U. S. 516 (25 Sup. Ct. 514, 49 L. Ed. 862); *Hawaii v. Mankichi*, 190 U. S. 197 (23 Sup. Ct. 787, 47 L. Ed. 1016); *Dorr v. United States*, 195 U. S. 138 (24 Sup. Ct. 808, 49 L. Ed. 128); *Ex rel. Kopel v. Bingham*, 211 U. S. 468 (29 Sup. Ct. 190, 53 L. Ed. 286); and see, also, Act April 28, 1904, chapter 1758, 33 Stat. 429 (U. S. Comp. St. Supp. 1909, page 1370).

The appellant's claim that the policy was absolutely canceled by the insured's letter of July 27th can not be sustained. The intent of the letter is uncertain enough to require a finding of fact, and it should not be said as a matter of law that it was intended to cancel the policy, or that the defendant was justified in so treating it. Mr. Currie's letter of July 27th to the appellant will bear the construction that its primary purpose was to ascertain directly from the home office of the company the effect on his policy of his residence in the Canal Zone. And, if such was the purpose of the letter, the appellant's letter in answer thereto evaded the question, and was calculated to induce the belief that the policy would remain in force unless its cancellation was effected by the means designated in the letter, to wit, its presentation at the office of the company. In other words, the insured might infer from the contents of his own letter and the appellant's answer thereto that the cancellation of the policy was optional

2. SAME:
waiver: evi-
dence.

with him, and that, if he did not cancel it, his residence in the Canal Zone would not affect its validity. The intent of both parties as shown by their letters and conduct were questions for the jury. And, if the appellant was not warranted in treating the letter of July 27th as an absolute cancellation of the policy, its own letter in answer thereto constitutes evidence of waiver of the condition of the policy limiting liability to certain territory. A waiver is the intentional relinquishment of a known right, and any conduct relied upon which warrants the belief that such relinquishment has been made constitutes in law a waiver. *May* on Insurance, section 507; *Hexom v. Knights, etc.*, 140 Iowa, 41; *Walsh v. Aetna Ins. Co.*, 30 Iowa, 133; *Kimbrow v. Insurance Co.*, 134 Iowa, 84. And the question of waiver is one of fact for the jury. *Taylor v. Insurance Co.*, 116 Iowa, 625.

We are of the opinion, therefore, that the court rightly refused to direct a verdict for the defendant, and should not have directed a verdict for the plaintiff. The case should have been submitted to the jury for its finding of fact on the question of waiver.—*Reversed.*

SOPHIA LUETTJOHANN, Appellee, v. JOACHIM LUETT-
JOHANN, Appellant.

Divorce: CRUEL AND INHUMAN TREATMENT: EVIDENCE. In this action by the wife for a divorce on the ground of cruel and inhuman treatment the evidence is held to justify a decree although actual physical violence was not shown.

Appeal from Cedar District Court.—Hon. W. N. TREICHLER, Judge.

TUESDAY, MAY 3, 1910.

Suit in equity for a divorce based upon the ground of cruel and inhuman treatment. The defendant denied the charge and pleaded a cross-petition, which he afterwards dismissed. The trial court granted the prayer of plaintiff's petition and awarded her alimony and the custody of certain children. From the decree granting the divorce, defendant appeals.—*Affirmed.*

C. O. Boling and Chas. W. Kepler & Son, for appellant.

W. G. W. Geiger and D. D. McGillivray, for appellee.

DEEMER, C. J.—Plaintiff was thirty-nine and defendant something over forty years of age at the time of trial. Plaintiff was a widow with four children when she married the defendant, and defendant, although unmarried, had an illegitimate child in Germany to whose support he contributed. At the time of the marriage plaintiff owned one hundred and sixty acres of land, live stock, agricultural implements, and \$300 in cash; and defendant is said to have had \$500 in cash. As a result of this latter marriage three children were born. Plaintiff's children by her former marriage became members of the new family, and all worked upon the one hundred and sixty-acre farm for several years; the revenues thereupon being used for the support of the family, the payment of debts, and the purchase of some South Dakota land, title to which was taken in defendant's name. Almost from the beginning defendant seemed unable to get along with his stepchildren. In so far as disclosed by the record, they were as dutiful and respectful as such children ordinarily are, and they did their full part of the work about the farm. As time went on, the relations between these children and the defendant grew worse, and he frequently struck, kicked, abused, and otherwise maltreated them—

generally without cause. He also used foul and obscene language toward them, often in the presence of their mother. Something like a year or eighteen months before the trial, defendant began to abuse his wife. It seems that, for some reason, he lost all love for her shortly after their marriage; but he did not become abusive until about the time stated. He compelled plaintiff to work in the fields when her physical condition would not warrant it. He used violent, profane, vulgar, and obscene language toward his wife and children, threatened to and did leave home for days at a time without cause, threatened, in the presence of his wife, many times to commit suicide, abused his own children in plaintiff's presence, struck his own brothers when they came to shield plaintiff from abuse and maltreatment, locked the doors of a room in which plaintiff was confined upon a sick bed, and struck the children who tried to enter to see their mother. He threatened to strike plaintiff with his fists and with a hammer, refused to purchase clothing for his children, and refused to send them to school, except for brief periods. He compelled his wife to change her church relations because he said the church to which she belonged was too religious. He had many fits of anger, during which he would rend his clothing and fall upon the floor in the presence of his wife. He could not get along with his neighbors and frequently slandered and abused them. He taught his children to use vile language and cursed and swore at them frequently in plaintiff's presence. Defendant went to a hospital in Davenport for treatment of a real or supposed ailment and called his wife there ostensibly to attend him. When she arrived he tried to induce her to sign a note for \$2,000. Upon her refusal to do so, he called her a liar and abused and scolded her. One effect of this, it seems, was to cure him of his ailment, for he almost immediately left the hospital and returned to the farm, where he continued to harass the plaintiff and her children. While he

had some income from his Dakota lands, he never used any part of it for the support of his family. He contends that his course of conduct was due to the attempt of plaintiff and her children by a former marriage to deprive him of the management of plaintiff's lands and to drive him therefrom; but the testimony does not justify any such conclusion. Her children by a former marriage often worked for others, and plaintiff was endeavoring to make the place agreeable to defendant. Indeed, for the eighteen months prior to the trial, defendant was a wanderer, and if it had not been for plaintiff's children the farm would not have had any sort of management. Defendant has an ungovernable temper, as shown by his relations with his neighbors and in his handling of his own stock. He did not show any affection for his children or his family and had no respect for their feelings. Defendant would grow very angry over small affairs and, instead of trying to govern his temper, let his feelings run riot to the great disturbance and despair of all about him. Plaintiff, it seems, did not return or resist his abuse, but had resort to woman's chief reliance in such cases—tears. His conduct caused plaintiff several attacks of sickness; the last one being during the trial of the case in the lower court.

From such a showing, which by no means reproduces all of the record, it is apparent that the trial court was justified in awarding plaintiff a divorce. If authority be needed, see *Luick v. Luick*, 132 Iowa, 302; *Hullinger v. Hullinger*, 133 Iowa, 270; *Shook v. Shook*, 114 Iowa, 592; *Berry v. Berry*, 115 Iowa, 543; *Rader v. Rader*, 136 Iowa, 223. None of these cases is stronger in its facts than the one presented by the record now before us, and in each a divorce was granted. It is not necessary that blows be struck, or that there be physical violence to entitle a wife to a divorce. Other things are quite as harmful and dangerous to health and life as bodily assaults. The trial court had the witnesses before him and evidently disbe-

lied many of defendant's statements. The printed record now before us shows that he had a convenient "don't remember" for many of the occurrences charged against him. It is naively suggested that defendant is insane, and therefore no divorce should be granted. His insanity is not of that form which excuses; instead of insanity, it seems that defendant had an ungoverned, and perhaps, from long use, an ungovernable, temper, which makes him a most unfit companion for a woman with any sort of feeling.

The decree is manifestly correct, and it is *affirmed*.

GEORGE E. LILLIE, Appellee, v. MINNIE S. OWEN and others, Appellants.

Trusts: EVIDENCE: SUFFICIENCY. Where one holds the legal title to property it requires a clear and satisfactory showing to justify the court in decreeing that the property is held in trust. In this action to partition real estate in which plaintiff claimed to own one-half absolutely and to hold the other one-half in trust, the evidence is held insufficient to sustain defendant's claim that the entire property was held by plaintiff as trustee in a resulting trust.

Appeal from Linn District Court.—Hon. F. O. ELLISON, Judge.

TUESDAY, MAY 3, 1910.

ACTION in equity for partition of real estate. Decree as prayed, and defendants appeal.—*Affirmed.*

Deacon, Good, Sargent & Spangler and Jamison, Smyth & Hann, for appellants.

Voris & Haas, James M. Gray, and Barnes & Chamberlain, for appellee.

WEAVER, J.—Stated in brief, the petition alleges that plaintiff is the holder of the legal title to lots Nos. 3 and 4 in block No. 11 in Daniel's addition to the town of Marion; that he is the absolute owner of an undivided one-half of said property; and that he took and now holds the title to the other undivided one-half thereof in trust for Luther P. Owen, who has since died testate devising all his estate and property to his children, Hazeltine Owen and Preston Owen, and naming Martha A. Elliott and Owen N. Elliott as executors of his will and trustees of the estate for the benefit of his said children. It is also alleged that Minnie S. Owen, the divorced wife of the deceased and mother of said devisees, is their duly appointed guardian, and that she makes some claim to or upon said property. All said persons are made defendants, and plaintiff asks that their interests in said property may be confirmed as alleged by him, and that partition be decreed accordingly. Hazeltine Owen and Preston Owen by their guardian answer denying that the plaintiff is the owner in his own right of any part or interest in said property, and allege that he took the legal title to the same and to all of it in trust for Luther P. Owen in his lifetime, and now holds it in like trust for the devisees under the will. Minnie S. Owen disclaims any title or interest in the property except such as she may have in her representative capacity as guardian for her children. The executors and trustees answer denying any knowledge of the facts and asking for proof of the matters in issue. The district court upon consideration of the evidence presented on the trial found for the plaintiff, confirmed his title to a half interest in the lots, and ordered partition on that basis. The guardian appeals on behalf of her wards, but the executors and trustees do not join therein.

It is the claim of the appellants, and there is evidence tending to show, that the lots in controversy were formerly owned by one Daniels, or Daniels & Co., who became bank-

rupts; that in the settlement of the business these lots were turned over to one C. M. Hollis in consideration of the cancellation of certain claims held by him and the payment of about \$152 in money; that Luther P. Owen furnished the money, aggregating about \$700, with which to consummate this transaction, and by virtue of an arrangement between him and Hollis became the purchaser and owner of the lots, but at his request the title was taken in the name of Lillie, who was his brother-in-law. When purchased the lots were unimproved, and for several years were put to no use except as pasture for horses owned by Owen. In the year 1901 four cottages were erected on the lots. Owen was the person actively engaged in making the contracts and paying the money thereon, but took receipts for payments as being made by "George E. Lillie, per L. P. Owen." He also collected the rents on the cottages after their construction and did other acts of ownership which we will not attempt to set out in detail. On the other hand, Lillie swears that he himself paid to Hollis the purchase price of lots, \$720, and paid the taxes thereon from year to year. There is other evidence tending to show acts of ownership on his part in the way of repairs on the buildings, payment of water rents, and other particulars. It also appears that, in the divorce proceedings between Owen and wife in the year 1905, the matter of the ownership of these lots became the subject of investigation, that Owen then alleged that he owned an undivided half thereof, and made a sworn statement specifically denying that he had any other or greater interest therein.

There is more or less corroboration of the claims asserted on either side; but we have given enough to show the general nature of the case as made by the contending parties. The death of both Owen and Hollis leaves us with but little competent direct evidence of the circumstances under which the title to the property was acquired, and very much of the record is made by proof of matters

which is little better than hearsay, or at best collateral circumstances which are not inconsistent with the truth of either contention. The legal title being found in the appellee, it requires a clear and satisfactory showing to justify the court in decreeing it to be held in trust merely. *Murphy v. Hanscome*, 76 Iowa, 192; *Cunningham v. Cunningham*, 125 Iowa, 681. It is true that, if it be clearly shown that Owen paid Hollis the purchase money and caused the title to be taken in the name of appellee, the latter would ordinarily be held as the trustee of a resulting trust; but the evidence of such payment is neither clear nor satisfactory. The best that can be said of the case, made by the guardian is that the facts shown by her are consistent with the theory that Luther P. Owen was the beneficial owner of the entire property, but to justify a decree impeaching the title upon circumstantial evidence the showing, as we have said, should be clearly inconsistent with the appellee's ownership in his own right. Indeed, we may take it for granted that Mrs. Owen does not desire the court to decree the title to be in her wards at the price of convicting her former husband and the dead father of her children of bald perjury, except upon the most convicting proof. Such a showing is not made by the record before us.

Considerable evidence on either side has been made the subject of objection either as to its competency or the competency of the witnesses; but we think it unnecessary to enter upon a consideration of the questions thus raised, for, if we were to hold the appellant's position in each instance to be correct, we are of the opinion that the record would still fail to justify any other conclusion than the one reached by the trial court. The issue is properly one of fact, and, holding as we do that the trial court correctly decided it, no further discussion is required.

The decree appealed from is *affirmed*.

JACKSON G. TUCKER, Appellant, v. WILLIAM G. STEWART,
W. H. WAPLES, T. G. CRAGIN, B. W. LACY, and
WILLIAM G. STEWART, JR., as Executor of the Will
of ROBERT W. STEWART, Deceased, Appellees.

BIRDEA TUCKER BRIGGS, Appellant, v. SAME DEFEND-
ANTS, Appellees.

OLIVE TUCKER, Appellant, v. SAME DEFENDANTS,
Appellees.

Administrators: ACTION UPON BOND: JUDGMENT: CONCLUSIVENESS.

I In an action on the bond of an executor for failure to make a payment as directed by a judgment setting aside the approval of his final report, the court will not investigate the justice of the claim on which the judgment was based, in the absence of a plea of fraud or collusion in obtaining the judgment.

Same: LACHES: ESTOPPEL. The approval of an administrator's final report and his discharge stands as a complete adjudication of his account until the same is set aside by a direct attack in equity; as the correctness of the account can not be inquired into in a collateral proceeding. But when the approval of the report has been thus set aside, and the administrator has failed to make restitution of money represented by an alleged fraudulent credit in his account, as directed by the court, an action therefor will lie against him and the sureties on his bond, when prosecuted promptly and in good faith. In the instant case laches as a ground of estoppel is not shown.

Same. Laches though sometimes available as a defense in equity have no place in an ordinary action for the recovery of a debt, unless prolonged for the full period of the statute of limitations.

Action upon executor's bond: LIMITATIONS. An executor's bond creates a continuing liability, each violation of which is a breach and furnishes a cause of action. So that while upon the approval of an administrator's final report an equitable cause of action

may arise for the purpose of having the approval vacated on the ground of fraud in the account, which in the case of minor heirs or legatees, as in this case, will continue during minority and one year thereafter; so too upon a judgment in such an action vacating the approval of the report and disallowing an item in the account credited to the executor, with direction that he account for the same in money, an ordinary action then, and not until then, accrues in favor of such heirs or legatees against the executor and the sureties on his bond upon his failure to so account, and the statute of limitations does not commence to run against the latter action until that time.

Vacation of executor's final report: PARTIES: NOTICE. The sureties on an executor's bond are not necessary parties to an equitable action to set aside the approval of his final report on the ground of fraud in his account; and an order vacating the same without notice of the action in no manner affects their liability, since they are in privity with their principal and are presumed to have knowledge of all orders regularly entered relative to the settlement of the estate.

Executors: FRAUD: LIABILITY OF SURETIES. An executor's bond is given to secure an honest and correct final accounting, and the approval of an account tainted with fraud or serious mistake, though operating for the time to prevent action on the bond, does not discharge all liability thereon; and when the report has been vacated for fraud liability of the sureties on the bond for the honest discharge of the trust by the executor is revived.

Appeal from Dubuque District Court.—Hon. M. C. MATTHEWS, Judge.

WEDNESDAY, MAY 4, 1910.

ACTIONS at law upon an administrator's bond. Judgment for defendants in each case, and the plaintiffs in each case appeal. The several actions depend upon substantially the same state of facts, and the appeals will be disposed of in a single opinion. The nature of the controversy will be more fully set forth in the opinion of the court.—*Reversed.*

Hurd, Lenehan & Kiesel, for appellants.

Glenn Brown, for appellee B. W. Lacy.

Kenline & Roedell, for the other appellees.

WEAVER, J.—The issue to be considered upon these appeals can be best explained by a chronological statement of the material facts. On February 16, 1885, John H. Floyd of Dubuque, Iowa, died testate. Among the legatees named in his will were Jackson G. Tucker, Birdena Tucker, and Olive Tucker, all of whom were minors. Soon thereafter L. E. Tucker was appointed guardian of the estate of said infant legatees, and as such became entitled to receive and hold for their use all the property and moneys coming to them under or by virtue of said will. William G. Stewart was appointed administrator with will annexed of the estate of said John H. Floyd, and qualified by giving the bond upon which plaintiffs seek to recover in these actions. Said bond was executed by himself, as principal, and by M. H. Waples, Robert W. Stewart, T. G. Cragin, and B. W. Lacy, as sureties, and was duly approved June 27, 1885. On February 5, 1890, Stewart, claiming to have fully administered upon said estate, made and filed a written final report, of which he asked the approval of the court. In this accounting he claimed and took credit for an item of \$6,000 which he alleged had been paid by him to the guardian of said Jackson G. Tucker, Birdena Tucker, and Olive Tucker on January 2, 1890. Notice of said final report was served upon said wards, all of whom were still minors, and upon their mother with whom they resided. No appearance was made by or in behalf of said wards to contest said report or account. It was examined by a referee appointed for that purpose who recommended its approval, and thereupon the court made an entry in the usual form approving the report, and, upon showing being made that the balance thus found against the adminis-

trator had been duly distributed, an order was entered under date of April 11, 1890, discharging said Stewart as administrator, and exonerating the bond given by him in that capacity. In the year 1896 and within one year after arriving at his majority, Jackson G. Tucker, in his own behalf and in behalf of his sisters, Birdena Tucker and Olive Tucker, who were still minors, instituted a proceeding in said district court to set aside the order approving the final report and reopen the account of said administrator, stating as ground of such demand, that the alleged payment of \$6,000 to the guardian of the plaintiffs under date of January 2, 1890, had never been made, and that the item of credit allowed therefor was false or mistaken. The sureties upon the administrator's bond were not made parties, and did not appear in this proceeding. The district court denied the relief prayed, and dismissed the bill. On appeal to this court it was decided that plaintiffs were entitled to the relief demanded, and to have the approval of said report vacated and set aside, and said account reopened for the purpose of charging the administrator with the sum for which he had wrongfully taken credit. The decree of the trial court was therefore reversed, and cause remanded for further proceedings in harmony with the opinion expressed in handing down said decision. *Tucker v. Stewart*, 121 Iowa, 714.

The opinion upon said appeal was filed October 31, 1903, and thereafter on April 8, 1904, the district court, upon application of the plaintiff, entered an order setting aside the approval of the final report so far as it related to said item of \$6,000, and directing the administrator to make settlement and accounting therefor to said wards, all of whom had then arrived at their majority, and were competent to make settlement with him in their own right. The administrator having failed to comply with said order and failing to pay over or account for the moneys so retained by him, separate actions at law to recover the

same were begun by the said Jackson G. Tucker, Olive Tucker, and Birdena Tucker, now Birdena Tucker Briggs. These actions were instituted in November, 1904, and by order of court were consolidated for the purpose of trial. Answering the plaintiff's demand, the defendants pleaded (1) that plaintiffs' right of action upon the administrator's bond is barred by the statute of limitations; (2) that the sureties upon said bond were not made parties to the proceedings for the reopening of the administrator's account and the adjudication therein is not binding upon them; that the final report and accounting made by Stewart on February 5, 1890, was fair and regular upon its face, and was duly and regularly approved by a court having jurisdiction of the proceedings and of the parties interested therein; that said sureties had no knowledge or notice that said credit of \$6,000 was not in all respects proper and just, and they relied and rested upon such settlement and order of discharge as a release of all liability on their part until they were made defendants in these proceedings nearly fifteen years after the entry of said order; and that during all said time neither plaintiffs nor any one for them ever gave said sureties notice of any claim against them on account of their suretyship—wherefore it is contended that plaintiffs are now estopped to maintain an action thereon. They also pleaded as a partial defense that interest upon the item of \$6,000 was paid by Stewart to the guardian of the plaintiffs for the years 1890 to 1894, inclusive. The plaintiffs base their claim and right of action solely upon the judgment of the court reopening the administrator's final account and disallowing the credit item of \$6,000 and ordering said administrator to account to them therefor, and upon his default in complying with such judgment and order. The defendants in turn offer in evidence the record of the probate proceedings in the matter of said estate so far as they show the final accounting made in the year 1890.

and the approval thereof. The surviving sureties upon the bond also testify to their reliance upon said settlement accounting and order of discharge, during all the period from the date of such order until the commencement of these actions. The trial court found for the defendants, and entered judgment in their favor for costs, and plaintiffs appeal.

The material facts are not the subject of any serious dispute. As will be seen by reference to the opinion filed in *Tucker v. Stewart, supra*, Stewart, instead of paying said sum of \$6,000 to the guardian, kept and converted it to his own use, giving his personal promissory note for the amount to the guardian, who gave him a receipt for it as for a payment in money. This we held to be a fraud upon the wards, and that they were entitled to have the approval of the final report set aside, the account reopened, and the administrator held liable to pay over the money so withheld by him. Complying with this decision the trial court, as we have seen, did reopen the account and order the administrator to pay over or make settlement for the sum thus found to be in his hands. This he did not do, and plaintiffs seek in the present proceedings to enforce the collection of the debt by action on the bond given by him to secure the faithful performance of his trust. It follows of necessity that unless the plaintiffs have in some manner estopped themselves from enforcing such demands, or it shall appear that the statute of limitations has intervened, or that said judgment reopening the account was obtained by collusion or fraud, they have a clear and unquestionable right to recover, because the failure to make payment of the trust funds in compliance with the order of the court was a palpable breach of the duty, for the performance of which the bond was given as security.

There is no plea that the judgment was fraudulently or collusively obtained, and the court can not, in this

proceeding, inquire into the justice of the claim upon which that adjudication was founded. *Chase v. Wright*, 116 Iowa, 555; *Irwin v. Backus*,

^{1. ADMINISTRATORS: action upon bond: judgment: conclusiveness.} 25 Cal. 214 (85 Am. Dec. 125); *State v. Holt*, 27 Mo. 340 (72 Am. Dec. 273).

The plea of estoppel is also manifestly without merit. There is nothing in the record tending to show that plaintiffs have in any manner deceived or misled the sureties ^{2. SAME: laches: estoppel.} to their injury. Beginning promptly when

the eldest of the three wards arrived at majority, and while the others were still minors, they set the machinery of the law in motion to obtain redress for the wrong they claimed to have suffered. They did not err in their choice of remedy, for, until upon some direct attack, the judgment approving the final report and discharging the administrator should be set aside, it stood as a complete adjudication of the account, and no action would lie against the administrator or the sureties upon his bond to compel a restitution of the sum represented by the alleged fraudulent credit. Their only adequate relief was to be found in equity, and its aid they invoked. Considering the stubborn resistance they encountered, and the erroneous adverse rulings for the correction of which they were compelled to appeal to this court, we can not say they are chargeable with undue delay in bringing the issue thus raised to a final hearing. Promptly, also, when the appeal was decided in their favor, they applied for and obtained the judgment reopening the account and ordering the administrator to satisfy their claim, and seven months later, such order not being obeyed, they instituted the action now under consideration. If good faith with the sureties required anything more at plaintiffs' hands than they are shown to have done, it does not appear in the record nor is it suggested in argument. It may be and doubtless is true that the sureties confidently relied upon the approval of the final report and the discharge of

the administrator as an effectual release of their liability upon the bond; but this confidence evidently had its basis in their interpretation of the legal effect of such judgment. It could not have been caused by the conduct of the plaintiffs, for they were at all times contending that equity would set aside said adjudication and enable them to prosecute their claim.

These actions are at law, and no delay in bringing them, however prolonged, short of the full period of the statute of limitations, will serve as a defense.
3. SAME: thereto. The plea of laches is sometimes allowed to prevail in equity, but it has no place in an ordinary action for the recovery of debt.

We come, then, to the plea of the statute of limitations which affords the only debatable ground in support of the position taken by the appellees. When did the plaintiffs' right of action accrue? The position for the appellees is stated in their brief as follows: "When the administrator reported in his final report, as a payment, the \$6,000 represented by his note, he thereby claimed a credit, and denied further liability therefor, and, if it was not a proper credit, the plaintiffs at once were entitled to begin a suit on his bond. *Wolf v. Wolf*, 97 Iowa, 279, 285. And no failure of plaintiffs to demand payment would delay the running of the statute. *Lower v. Miller*, 66 Iowa, 408; *Ackerman v. Hilpert*, 108 Iowa, 247." And such we may assume was the view of the trial court. If we correctly apprehend the meaning of the language here employed, it is argued that, when Stewart filed his final report claiming this wrongful credit, a right of action on the bond at once accrued to the appellants, and nothing thereafter occurring served to interrupt its running until the bar became complete one year after the youngest ward became of age in 1901. But a little reflection will make plain the fallacy of the argument. The administrator's

4. ACTION UPON
EXECUTOR'S
BOND: limita-
tions.

final report and its approval were matters of which the court had full jurisdiction in the probate proceedings, and neither appellants nor any other beneficiary of the estate could properly interrupt or interfere with those proceedings by instituting an action upon the bond. If every heir or legatee discovering fraudulent credits in the final report of an administrator should be authorized to bring action at once upon the bond, instead of objecting to the report and contesting its allowance, the practice would develop indescribable confusion, and estates be wasted in multiplicity of litigation. The item of \$6,000 which is the subject of controversy was already before the court for its consideration, and even though fraudulent it gave rise to no right of action on the bond until its spurious character had been adjudicated, and the administrator had failed to make proper accounting for the money it represented. When the judgment approving the report, including this item, and discharging the administrator was entered, it constituted a complete adjudication thereof, and, until in some appropriate proceeding it was reversed, vacated, or set aside, no action at law could be maintained upon the bond, for to such an action the judgment would be a final and conclusive answer of nonliability. The validity of the judgment was not open to collateral attack. When no appeal has been taken and ordinary application for a new trial is not available, such a judgment can be opened up only by an exercise of the court's equitable jurisdiction. *Rogers v. Johnson*, 125 Mo. 202 (28 S. W. 635); *Holden v. Lathrop*, 65 Mich. 652 (32 N. W. 879); *State v. Burkam*, 23 Ind. App. 271, 55 N. E. 237; *Cowins v. Tool*, 36 Iowa, 82; *Peacocke v. Leffler*, 74 Ind. 327; 18 Cyc. 1192, 1196.

A right of action did accrue to plaintiffs at the date of the judgment approving the report, but it was not a right of action on the bond. The right which they then acquired was to an action in equity to vacate the judg-

ment and reopen the account for the purpose of canceling the credit which had been wrongfully obtained. The right under our statute continued as to each plaintiff for the remainder of his or her minority and for one year thereafter. Code, section 3453. They did begin such action within the period thus allowed to them, and ultimately secured an adjudication vacating the judgment, reopening the account, and disallowing the credit item of which they complained. It was then that the right of action here sought to be enforced accrued. Counsel for the appellee overlook the fact that there may be successive and distinct breaches of the bond growing out of the same transaction, and while the statute of limitations may have run as to the earlier, it may be no defense to the later, breach. It may be, though we need not here decide, that the transaction between Stewart, the administrator, and Tucker, the guardian, was a breach of the bond for which a recovery of at least nominal damages could have been then had, even though upon demand for settlement the money had been promptly produced. So, also, we could concede counsel's contention that the presentation of the final account containing the claim of a credit for \$6,000 which had never in fact been paid was a breach of the bond for which a right of action at once accrued. If the court had refused to allow the credit, and had entered judgment requiring the administrator to pay over to the guardian the full amount in money or its equivalent, his failure to comply with that order would have been a new breach of the bond for which an action would lie at any time within ten years from the date of such judgment. So, also, when the approval of his report including the wrongful credit was set aside, and he was ordered to account to the appellants, his refusal so to do was a new and distinct violation of his trust, for which a new right of action arose. See *Thayer v. Keyes*, 136 Mass. 104. The cited case is quite in point. It was there

the duty of an administrator to invest a certain fund, and pay over the interest collected thereon to a testator's widow for life. He did not invest the money, but gave the widow his own note. More than twenty years later and after the death of the widow, the legatees interested in the remainder brought suit on the administrator's bond. In overruling the plea of the statute of limitations the court says that, while the original failure to invest the money as directed may have been a breach of the bond for which an action would lie, yet it afforded no sufficient answer to the plaintiff's demand, and that, while they "might perhaps have maintained an action upon the first breach of the bond, they may also maintain an action for any subsequent breach. A waiver of the first breach or any number of breaches will not prevent them from suing on a subsequent one. It is well settled that an executor's bond is a continuing one, commensurate in time with his duties, and each violation of it is a breach and furnishes a cause of action." See, also, *Fuller v. Cushman*, 170 Mass. 286 (49 N. E. 631).

The inadmissibility of any other rule can be easily illustrated. If, for instance, an estate has been for nine years in the process of administrating, and the final report reveals a sum of money belonging to the estate which the administrator converted to his own use in the first year of his service in such trust, and an order is entered requiring him to account for it, such order imposes upon him a duty which he can not violate without breach of his bond, if then two years later the order not being obeyed action is brought on the bond and the administrator and his sureties set up in defense the statute of limitations because the original wrong was committed, and the first breach of the bond was consummated, more than ten years before suit was brought, no court would be likely to give such a plea any serious consideration. Obedience to the order of the court is one of the duties pertaining to the administrator's

trust, and the breach of that duty is of itself a sufficient cause of action, and it is not open to him to say that the original default on which that order was based occurred at a time so long prior thereto that the bar of the statute has intervened. All controversy over the original liability has been settled and merged in the order or judgment requiring him to pay, and the statute of limitations starts anew therefrom.

Appellees concede in argument that, until vacated and set aside, the adjudication of April 11, 1890, approving the final report, was a complete bar to the maintenance of an action on the bond, but they say this can not prevent the operation of the statute of limitations because (quoting from the brief): "If such judgment of discharge was in fact subject to attack, the administrator and sureties could have been made parties to a proceeding to set the same aside, as was done in *Arnold v. Spates*, 65 Iowa, 571, and as was expressly held the proper procedure in *Witt v. Day*, 112 Iowa, 110, *supra*; *Payne v. Hook*, 7 Wall. 425 (19 L. Ed. 260); *Reinhardt v. Gartrell*, 33 Ark. 727, and *Clark v. Shelton*, 16 Ark. 474, and these defendants would then have had an opportunity to defend against such an attack. They would have had their day in court, and no other suit or action would have been necessary." But the conclusion which counsel draw from these premises is clearly untenable.

It may be admitted that appellants could properly have made the sureties parties to the proceeding to vacate the judgment, but certainly they were not necessary parties. Had they been made parties they could have done no more—generally speaking—than to unite with the administrator in resisting the charge of fraud on which the vacation of the judgment was asked. The extent of their liability, if any, on the bond was not, and ordinarily could not have been, put in issue. The essence of the relief asked was the setting aside of the adjudication to

enable the appellants to be heard in resistance to the credit item of which they complained. Such vacation was a necessary preliminary to their right of action at law for recovery on the bond. The vacation of the judgment would not of itself or of its own force work a rejection or cancellation of the item challenged, but it would reopen the subject of its allowance for trial upon the appellant's exceptions thereto. If those exceptions should be sustained, and the money represented by such item be not accounted for, an action at law upon the bond would lie. Assuming, for the purpose of this case, that appellants could properly have made the sureties parties to the proceeding for vacation of the judgment and could properly have asked therein for recovery on the bond, we are clearly of the opinion they were not required so to do, and that if the prayer for a vacation of the judgment and reopening the account were granted, and their objections to the credit of \$6,000 sustained, they were entitled to their action at law for the collection of the moneys due them from the administrator and his sureties. The liability of the administrator on the bond given by him for the faithful performance of his trust is at all times the measure of the liability of his sureties. If there be any exception to this rule, we can conceive of none in cases like this. It would be little less than absurd to hold that an administrator may fraudulently obtain an unjust allowance of credit in his final report, and then have the statute of limitations run in his favor during all the time he consumes in resisting an action to reopen the account. If such be the law it indicates a serious defect in our system of legal justice. None of the authorities cited by counsel support such a conclusion, and if the administrator can not find shelter under the statute of limitations, then his sureties can not avail themselves of such defense. Their express undertaking was that said administrator should "well and truly perform and discharge all duties imposed

upon him by law" in the matter of such administration. Among the duties thus imposed upon him was obedience to the order and judgment of the court entered April 8, 1904, to account for said item of \$6,000, and, for his default in that respect, his sureties are of necessity liable to answer. The fact that this right of action did not accrue until after the order of April 11, 1890, is immaterial, for, while the default in the observance of the later order for payment of the money did not occur until April 8, 1904, the liability to such order had its origin in the fraud which vitiated the approval of the final report on the date first mentioned. Upon the vacation of the judgment approving the report it ceased to be available to the administrator or to his sureties as a defense to the appellants' demand.

Whether the fault in the administrator's final report was due to his fraud or mistake, it was confessedly his duty to rectify it, and, so long as that duty remains legally

s. VACATION OF
EXECUTOR'S
FINAL REPORT:
parties:
notice.
enforceable against him, it remains enforceable against those who have undertaken to assure his performance of it. In other words, so long as there remains any duty

which he as administrator is legally liable to perform, so long the obligation upon the bond continues to remain upon his sureties. *Alexander v. Bryan*, 110 U. S. 414 (4 Sup. Ct. 107, 28 L. Ed. 195); *Deobold v. Opperman*, 111 N. Y. 531 (19 N. E. 94, 2 L. R. A. 644, 7 Am. St. Rep. 760); *Scofield v. Churchill*, 72 N. Y. 565; *Boone Co. v. Jones*, 54 Iowa, 709; *Parsons v. Milford*, 67 Ind. 489.

To say that an order of discharge, obtained by fraud of the administrator, operates to relieve the sureties from liability on the bond, although that order has been vacated, would be to hold that they may reap advantage from the very wrong against which they undertook to hold the appellants harmless. The sureties upon such bond are in

privity with their principal, and the fact that they were not served with formal notice of the proceedings to vacate the order approving the final report does not effect any change in that relation. Neither were they formally made parties to the final accounting. They are presumed to have knowledge of all orders of court regularly and properly entered in the matter of settling the estate upon which their principal administers. *Casoni v. Jerome*, 58 N. Y. 315; *Salyer v. State*, 5 Ind. 202; *State v. Berning*, 74 Mo. 87; *Perkins v. Scott*, 9 Ohio Cir. Ct. R. 207; *Baggott v. Boulger*, 2 Duer (N. Y.) 160; *Deobold v. Opperman*, 111 N. Y. 531 (19 N. E. 94, 2 L. R. A. 644, 7 Am. St. Rep. 760); *McMahon v. Smith*, 24 App. Div. 25 (49 N. Y. Supp. 93). It follows that, as a settlement and discharge of the principal obtained by fraud and set aside by the court because of such fraud can not be pleaded by him in excuse of his failure to pay the sum with which he is found chargeable on a reopening of the account, it is equally unavailable to his sureties whose liability on the bond is coextensive with his own.

In avoidance of this conclusion appellees urge that, while the rule making coextensive the liability of principal and sureties upon a bond of this character is well

established, it is not applicable here, because
6. EXECUTORS:
fraud: liability of sureties. from the date of the order approving the final account the relation of principal and surety between the administrator and his bondsmen ceased to exist. But for reasons already pointed out, this objection is unsound. One of the things which this bond was given to secure was an honest and correct final accounting, and until that duty was performed liability on the bond continued. The presentation and approval of an account tainted by fraud or by serious mistake, though operating for the time being to prevent action on the bond, could not operate to cancel or release all liability thereon so long as any right remained to set aside the order thus

wrongfully obtained. Pending the equitable proceeding, there was at most a suspension of their liability to an action at law on the bond, but there was no release of liability until the administrator's duty was performed.

As the judgment below must be reversed upon the merits of the controversy, we need not consider other questions argued by counsel. The case is ordered remanded for further proceedings not inconsistent with the views herein expressed.—*Reversed.*

MICHAEL GALUCHA, Appellee, v. CHARLES NASO, Appellant.

Contracts in restraint of trade: BREACH: DAMAGES: EVIDENCE.
In an action for damages for breach of an agreement not to re-engage in a competitive business, it is proper for plaintiff to show a reduction in the amount of his business and daily sales after defendant re-entered the business, as bearing on the question of damages, even though such evidence relates to a time subsequent to the commencement of the action.

Appeal from Linn District Court.—HON. MILO P. SMITH,
Judge.

THURSDAY, MAY 5, 1910.

ACTION to recover damages for breach of contract.
Judgment for plaintiff, and defendant appeals. The facts will be stated in the opinion.—*Affirmed.*

F. L. Anderson and J. H. Preston, for appellant.

Redmond & Stewart and Frank C. Byers, for appellee.

WEAVER, J.—Prior to September, 1907, the defendant had for some time been engaged in the retail fruit, confectionery, and tobacco business in the city of Marion, Iowa. Whether he was at all times the real proprietor of said

business or acted as the partner or agent of one Mercurio who held a bill of sale of the goods is not entirely clear, nor do we deem it very material in this case. About the date named plaintiff had negotiations with both defendant and Mercurio for the purchase of the business, and a price was agreed upon and paid. Mercurio transferred the title of the property to plaintiff, who took possession, and has since continued therein. Plaintiff alleges that defendant as a part of the same deal agreed to go out of the trade at that place, and not open up again in competition with him, but that within a month or two after said contract was made defendant reopened a retail business in the same line in plaintiff's immediate vicinity, to the injury of the plaintiff who seeks to recover damages. The defendant denies the alleged agreement. There was trial to a jury and verdict returned for plaintiff for the sum of \$375. Motion for new trial being overruled, judgment was entered on the verdict, and defendant appeals.

The issue whether defendant made the agreement pleaded by the plaintiff was one of fact, and, the evidence being conflicting, the finding of the jury thereon will not be disturbed by the court. The only question seriously urged upon our attention by defendant is that the damages are excessive, and that the court erred in several respects in admitting testimony thereon, and in submitting the issue to the jury. It is first said that plaintiff was erroneously permitted to show damages which occurred after bringing suit and before trial. It appears that the action was brought in the usual manner, and being reached for trial, and no one appearing for the plaintiff, it was ordered dismissed, but was reinstated by the court on the following day. After the dismissal, a new original notice was served on the defendant of the filing of another petition. That petition was filed in the same case, and was evidently treated and considered by the court as an amendment or supplement to the original petition. With this

construction of the pleadings there was no prejudicial irregularity of error with respect to the time which plaintiff was allowed to cover in his testimony.

The appellee's criticism of the rulings and instructions of the court concerning the damages and the measure of plaintiff's recovery grows out of an apparent misconception of the theory to which the court held. The action was not brought to recover for mere loss of profits, nor do we understand the trial court to have adopted that theory. The injury of which plaintiff complained was to the value of his business, and proof of reduction in the amount done and in the daily sales after defendant re-entered business was admitted as bearing on that proposition, but not as in itself affording a measure for the recovery of damages. The rule given by the trial court to the jury was in substance the one approved by this court in *Moorehead v. Hyde*, 38 Iowa, 385. As bearing upon this question, we see no good reason why proof of the facts concerning the manner in which the business was affected by the wrongful competition even after suit was brought was not admissible. Losses in such case are not ordinarily susceptible of any mathematically exact measurement. The most that can be done is to adduce the pertinent facts and submit them to the jury to estimate and determine the sum which will afford the injured party reasonable compensation. It appears to have been fairly done in this case, the damages allowed do not seem to be excessive, and no good cause is shown why this controversy should be further prolonged.

The judgment of the district court is *affirmed*.

IN RE ESTATE OF THEODORE MUNIER, Deceased, LOUISA MUNIER, LUCY MUNIER and GEORGE MUNIER v. EUGENE C. MICHEL, JOSEPHINE L. METCALF and ELIZA M. LEVASSEUR, Appellants.

Wills: CONTEST: MENTAL INCAPACITY: INSTRUCTION. Where the contestants of a will relied to a large extent upon evidence of the alleged paralysis of the testator as tending to render him incapable of making a will, and there was also other evidence of mental weakness upon which the contestants relied, it was error for the court to instruct that unless the jury found the contestant to have been affected by the stroke of paralysis the will must be sustained.

Evidence: HYPOTHETICAL QUESTIONS: INSTRUCTION. While all the facts stated in a hypothetical question must have support in the evidence, still it is not necessary that the question cover the whole case; and an instruction that the jury might disregard the testimony of experts to whom the question was propounded, unless it found that all the facts were covered by the question was erroneous.

*Appeal from Linn District Court.—Hon. MILO P. SMITH,
Judge.*

THURSDAY, MAY 5, 1910.

THE defendants contested the probate of the will of Theodore Munier. There was a verdict and judgment for the proponents, and the defendants appeal.—*Reversed.*

C. E. Wheeler, J. H. Preston, F. L. Anderson, and W. F. Fitzgerald, for appellants.

Voris & Haas and Jamison & Smyth, for appellees.

SHERWIN, J.—Theodore Munier died in August, 1908,

at the age of eighty-one. He left surviving him a widow, his third wife, and five children, two of whom were born to his first wife, and one who was born to the second wife, and two children of his third wife. He left an estate of the value of about \$90,000, and a will devising to each of his three older children \$500, to his wife the use of the rest of his estate during her life, in lieu of her distributive share, and to the two youngest children the remainder of the estate after his wife's use thereof, in equal shares. The widow and her two children offered the will for probate, and the three children by the former marriages contested the probate thereof on the ground of mental incapacity and undue influence. After the evidence had been received, the court took the question of undue influence from the jury and submitted to it only the question of mental incapacity when the will was made in October, 1904.

There was evidence tending to show that during his entire adult life the deceased had been an habitual user of intoxicating liquors at his home, and that such use

i. WILLS: con-
test: mental
incapacity:
instruction. would have a tendency to weaken his mental strength. There was also evidence tend-
ing to show that the deceased was mentally unsound from the year 1902 until his death in 1908, and that in 1902 he had a stroke of paralysis, from which he never fully recovered. While the contestants relied to a great extent on the alleged paralysis of 1902, it was not the sole ground upon which they based their claim of incapacity when the will was made. It was therefore error to instruct that, unless it was found that the deceased had a stroke of paralysis in 1902, the will must be sustained.

The contestants used several physicians, who testified in answer to a hypothetical question that the deceased was of unsound mind when he executed the will. The hypothetical question was long, and omitted some parts of

the evidence which might have been of benefit to proponents if included therein. The trial court

2. EVIDENCE:
hypothetical
questions: in-
struction.

instructed that, if the facts were all substantially stated in the hypothetical questions put to the medical experts, the jury might consider such testimony, and said: "But in any case where a hypothetical question is not a correct statement of the facts then in such a case you are warranted in wholly disregarding the answer." It is not necessary to state all of the facts in a hypothetical question. The facts stated must appear and have support in the evidence, but the party propounding the hypothetical question is not required to cover the whole case. *Bever v. Spangler*, 93 Iowa, 576; *Allison v. Parkinson*, 108 Iowa, 154. It is manifest that the jury would understand from the entire language of the instruction that it might disregard the testimony of the contestants' medical experts, unless it was found that all of the facts were covered by the hypothetical questions, and this was in our judgment very prejudicial to the contestants.

The alleged inconsistency between instructions four and six and seven is sufficiently covered by what we have said about the sixth instruction.

Criticism of other instructions need not be further noticed.

It is urged that many errors were committed in ruling on the receipt of testimony. Some of the testimony offered by the contestants in their main case which was excluded would undoubtedly have been competent in rebuttal, but there was nothing in the record at the time of the rulings which so indicated, and, in the main, we think the rulings correct. At any rate, the doubtful rulings are not likely to again occur.

The appellees seriously contend that there should be no reversal, whatever errors may appear, for the reason that there is no substantial evidence of mental incapacity

or of undue influence. We can not agree with the contention, however, and the judgment must be reversed for the errors pointed out.—*Reversed.*

GRACIE DUBOIS, by her next friend, C. L. Dubois, her father, Appellee, v. H. J. LUTHMERS, A. J. LUTHMERS, ET AL., Appellants.

Negligence: SALE OF GASOLINE: EVIDENCE: INCONSISTENT STATEMENTS.

1 In this action for personal injury to a child, the result of an explosion of gasoline claimed to have been negligently sold and delivered to plaintiff as kerosene in a can not intended for gasoline, plaintiff's father had testified to having a can about his place and that immediately after the accident he sent it back to the defendants, that he had himself previously purchased gasoline which was put in the can and that the can was painted red. There was also evidence tending to show that the can was not sent back but was in possession of the family the day following the accident and that it had lettering on it as required by the statute. *Held*, that evidence of a conversation between the father and defendants shortly after the accident, to the effect that he did not blame defendants, as he had a gasoline can, was admissible. Held also that it was competent to show that on the day following the accident members of the family were seen in possession of a gasoline can properly painted and lettered; and that the declarations of those in possession of the can as to what they where going to do with it were admissible, as verbal acts explanatory of their possession.

Same: EVIDENCE: *Res gestae*. To be admissible as part of the *res*

2 *gestae* it is not necessary that the statements be made by a party to the action; nor is time of controlling importance under all circumstances. Thus in an action for injury to a child due to an explosion of gasoline, statements of the mother made a few minutes after the accident as to how it occurred were admissible as part of the *res gestae*.

Negligence: DEFINITION. An instruction that negligence consists in

3 doing something which a person of ordinary prudence and care would not have done or would not have omitted to do under the same or similar circumstances, while not as clear a statement as might be made, is not on that account reversible error.

Appeal from Oelwein Superior Court.—Hon. D. M. PORTER, Judge.

THURSDAY, MAY 5, 1910.

ACTION at law to recover damages for personal injuries received by plaintiff due to an explosion of gasoline, which gasoline it is charged was delivered and put in a can not marked as required by law; and negligently delivered to plaintiff without informing her of the fact that it was gasoline. Defendants' answer was in effect a general denial. The case was tried to a jury, resulting in a verdict and judgment for plaintiff in the sum of \$2,500. Defendants appeal.—*Reversed.*

Jay Cook and W. B. Ingersoll, for appellants.

No appearance for appellee.

DEEMER, C. J.—Plaintiff claims that her mother sent her and her brother Guy, a boy of six years of age, to defendants' store to buy ten cents worth of kerosene; that they took with them a dark red two-gallon can which did not have the word gasoline printed on it; that the children went to the defendants' store, called for the kerosene, and that defendants, instead of putting kerosene into the can, put in gasoline and delivered it to the children, who took it home with them in the can which they took to the store. After they had brought the can home, plaintiff, by the direction or consent of her mother, undertook to start or replenish the fire in a cook stove preparatory to the preparation of a meal, and in so doing she turned some of the contents of the can into a cup and put it on the fire, resulting in an explosion which caused the injuries complained of. There is much dispute in the testimony regarding the character of the can into

which defendants put the gasoline, and also as to what plaintiff and her brother ordered when they went to defendants' store, so that the trial court was justified in submitting these matters to the jury by proper instructions. The manner in which the case was submitted is shown by the following instruction given to the jury as a part of the court's charge: "Par. 7. The burden is on the plaintiff to prove by a preponderance of the evidence: (a) That the defendant A. J. Luthmers as agent for H. J. Luthmers, was negligent and did not use ordinary care in the manner charged in the petition either (1) in delivering to the boy Guy Dubois, or to him and plaintiff, gasoline when he asked for kerosene, and not informing him thereof; or (2) that defendant did deliver to the boy Guy Dubois or to him and plaintiff, gasoline in a can not properly painted or labeled as the law provided. (b) That she was injured by reason of such negligence and want of care on the part of defendants and while using some of the substance in starting a fire while using ordinary care. (c) That she in no way by her negligence contributed to produce the injury complained of." By section 2510j, Code Supp. 1907, it is provided: "Every person dealing at retail in gasoline in this state shall after the first day of January, 1907, deliver the same to the purchaser in quantities of more than one quart, and less than six gallons, only in such barrels, casks, packages, cans or measures, painted vermilion red and having the word gasoline plainly stenciled or marked thereon. No such dealer shall deliver kerosene in a barrel, cask, package or can painted or marked as above." There was testimony strongly tending to show that the can in which the gasoline was delivered was painted a vermilion red, and that it had lettering thereon; but the significant thing about the matter is that plaintiff took the can whatever it may have been from her parents who owned it, and presented it to the defend-

ants as a proper receptacle for the gasoline or kerosene, no matter which it may have been that plaintiff ordered. Moreover, the can as presented to the defendants had some oil in it when presented to the defendants. The fact that defendants may have violated the law in putting gasoline into a kerosene can is not material to an inquiry in this case. Even though this may have been a violation of law, it was in no sense the proximate cause of plaintiff's injuries. Had it been kerosene, doubtless plaintiff would not have been injured, although this is entirely a matter of conjecture.

I. The chief matters relied upon for a reversal are alleged errors in the admission and rejection of testimony and erroneous instructions claimed to have been given by the trial court. As to rulings on evidence,

1. NEGLIGENCE:
sale of gaso-
line: evidence:
inconsistent
statements.

we find the following: Plaintiff's father and next friend was a witness for plaintiff, and the record shows the following with reference thereto:

"I am the father of plaintiff in this case, and brought this action for her as her next friend. I have had charge of this litigation at all times. Q. State whether or not you was in Luthmer's Cash Grocery Store a few days after this accident occurred. A. I was. Q. Do you remember a conversation that you had with A. J. Luthmer at that time? A. Yes, sir. Q. Do you remember of stating in that conversation to Mr. Luthmer in the presence of Ed. Luthmer that you did not blame them in particular, as you had a gasoline can, or words to that effect? (Objected to by plaintiff's counsel as immaterial, irrelevant, incompetent, not in any way tending to contradict anything the witness has testified to on the direct hearsay. Objection sustained. Defendant excepts.)" Witness Ed. Luthmer was then called by defendant, and the record shows the following: "Q. You may state whether or not a day or two after the accident complained of in this case you overheard a conversation between Mr. Du

Bois and your nephew, A. J. Luthmer? A. Yes, sir. Q. In which Mr. Du Bois made the statement that he did not blame any one in the store as he had a gasoline can? A. Yes, Sir. (Objected to by plaintiff's counsel as immaterial, irrelevant, incompetent, hearsay, and no proper foundation has been laid for its introduction. Objection sustained. Defendant excepts.)"

The witness had already testified as to his having a can about his place, and that immediately after the accident he sent it back to defendants, and that he had once himself purchased gasoline which was put into the said can. He further said that the can was painted red. Moreover, there was testimony tending very strongly to show that this can was not sent back to defendants as claimed, but that it was in possession of plaintiff's family the next day after the accident, and that it had lettering upon it. In view of this record, we think the trial court was in error in the rulings above set out. The testimony was certainly impeaching in character, and should have been received.

Again, certain of plaintiff's children were seen in possession of a gasoline can the morning after the accident, and a witness was asked as to their declarations while in possession of the can as to what they were going to do with it. The testimony tended to show that this can was properly painted and labeled. As it was competent to show their possession of this can, their declarations as to what they were going to do with it was admissible as verbal acts explanatory of their possession. This is fundamental law.

II. Within ten minutes after the explosion and accident, a Mrs. Hodge appeared upon the scene, and defendant offered to show what Mrs. Du Bois, the mother of the plaintiff, stated as to how the accident occurred. This was, as we think, part of the *res gestae*, and should have been received. It

2. SAME: evidence: *res gestae*.

is not necessary to the admissibility of such testimony that the declaration be made by a party to the action. Other things being shown declarations of a third party are competent. 11 Ency. of Evidence, 337, and cases cited. The time element, while important, is not controlling under all circumstances. We think the testimony should have been admitted.

III. Some of the instructions are complained of. One, the fourth, reading as follows: "Par. 4. Negligence consists in doing something which a person of ordinary prudence and care would not have done or would not have omitted to do under the same or similar circumstances"—is not as clear as it might have been, but we would not reverse for this error alone. Other instructions are not erroneous. They need not be set out, as they relate to elementary principles of law.

For the errors pointed out, the judgment must be, and it is, *reversed*.

FRED S. CORRICK, Appellant, v. JONAS DUNHAM and GERTRUDE DUNHAM, Appellees.

Husband and wife: ALIENATION OF AFFECTION: MALICE: EVIDENCE.
A presumption of malice sufficient to support an action for alienation of affection does not arise from a mere showing, as in this case, that defendants were sorrowful and indignant and manifested ill will towards plaintiff when they learned of the fact that he had secretly married their daughter.

Appeal from Tama District Court.—Hon. C. B. BRADSHAW, Judge.

THURSDAY, MAY 5, 1910.

THIS is an action for damages for alienation of affection of plaintiff's wife. There was a directed verdict for the defendants, and plaintiff appeals.—*Affirmed.*

C. E. Walters, for appellant.

C. H. Van Law, for appellees.

EVANS, J.—The defendants are the father and mother of the plaintiff's wife. Since 1905 the plaintiff had been the hired man of the defendants. He was forty-seven years of age. In December, 1907, he secretly married the young daughter of the defendants; the ceremony being performed in another county and without the knowledge of the parents. Some weeks after the marriage, the plaintiff left the home of the defendants and left his wife there, and, while absent therefrom, wrote a letter to the defendants, advising them of the fact of his marriage to their daughter. A few days later he returned to the nearby town and hired a livery man to take him to the defendants' home, where he arrived in the evening. His story is that, "when we got to the house, we drove in the driveway by the house and I hollered, 'Hello.'" This call brought Mrs. Dunham to the door, and she greeted the plaintiff in terms which were the converse of affectionate, and ordered him to leave the place, which he did. His claim now is that he has lost the affection of his wife through the machinations and the malice of her parents, and he asks \$10,000 as damages therefor. At the close of the testimony in his behalf, the trial court directed a verdict against him. His claim is that he had sufficient evidence to go to the jury, and that is the controlling question for our consideration.

The plaintiff called his wife as a witness in his behalf. Her undisputed testimony is sufficient to sustain the action of the court. It is the contention of plaintiff that his testimony showed harsh conduct and ill will towards him on the part of the defendants, and that such conduct was sufficient show of malice, and that the jury would have been warranted in finding from the circum-

stances shown that defendants had been guilty of alienating the affections of his wife. The mere fact that the defendants manifested ill will toward the plaintiff would not justify sufficient inference by the jury to make a case for the plaintiff. The plaintiff was a man without means and without a home. According to his wife's story, he had lied to her and had abused her, and had told her he was going to leave her when he went away, and that she would be a "grass widow." That the parents should be sorrowful and indignant when they learned the facts through plaintiffs' letter and from their daughter raised no presumption of malice against them. They drank a bitter cup, and they were not bound to affect that it was otherwise. They properly extended to their daughter the protection of the parental home, and no evil presumption was raised against them by reason of such asylum. The law does not disregard or make light of parental affection, and its first presumption is that such affection will seek the best interests of the child, whether married or unmarried. Were it otherwise, cruel husbands of young wives might too easily reap pecuniary profit out of their harsh conduct when resented by parental affection. The marriage relation is not to be too easily converted into a money asset lest such prospective asset become a lure, and conjugal affection be too willingly lost at a profit. There is a way to win and hold the affection of a wife by affectionate conduct, and parental love or interference has not usually been a very successful obstacle to such method. The law does not aim to dispense with such winning and affectionate way on the part of the husband, nor does it guarantee to him wifely affection in the absence of it. Nor does it offer him any insurance for the loss of such affection by unworthy conduct on his own part.

For authorities on the question of presumption and tender regard of the law for parental affection, see *White*

v. Ross, 47 Mich. 172 (10 N. W. 188); *Brown v. Brown*, 124 N. C. 19 (32 S. E. 320, 70 Am. St. Rep. 574); *Hutcheson v. Peck*, 5 Johns. (N. Y.) 196; *Reed v. Reed*, 6 Ind. App. 317 (33 N. E. 638, 51 Am. St. Rep. 310).

We have read the evidence in this case with care, and find it clearly insufficient to have warranted a verdict for the plaintiff. The trial court properly directed a verdict for the defendants, and its order is *affirmed*.

IN RE ESTATE OF GEORGE PHELPS, Deceased. Petition of LILLIAN PHELPS MERRILL for Payment of Legacies.

LILLIAN PHELPS MERRILL, Appellant, v. **FREDERICK S. PHELPS and THOMAS F. PHELPS**, Residuary Legatees, and **WILLIAM A. SANFORD, WILLIAM S. CARPENTER and THOMAS F. PHELPS**, Executors.

Wills: CONSTRUCTION: DEATH OF LEGATEE: DISPOSITION OF DEVISE. The heirs of a devisee dying before the testator will, under the statute, inherit the property so devised, unless a contrary intent is manifest from the terms of the will; but where by the terms of the entire will, as in this case, the manifest intent of the testator is to dispose of his estate without the aid of the statute and contrary thereto, the heirs of a legatee dying before the testator can not invoke this statute in their behalf.

Appeal from Winneshiek District Court.—Hon. A. N. HOBSON, Judge.

TUESDAY, MAY 10, 1910.

THE opinion states the case. Judgment *affirmed*.

Lacy, Brown & Lacy, for appellant.

Hamlin & Boyden and Albert M. Kales, for appellees.

SHERWIN, J.—On the 20th day of July, 1906, George Phelps executed his last will and testament at St. Paul, Minn. He died on the 7th day of November, 1907, and his said will was duly probated in Winneshiek County, Iowa. One of the bequests under the sixth item of his will was of \$25,000 to his brother, Thomas Phelps, of Chicago, Ill. Thomas Phelps died on the 25th day of December, 1906, leaving surviving him two daughters, Lillian Phelps Merrill, the appellant herein, and Viola Phelps Carpenter, his only heirs at law. The appellant brought this action to compel the executors to pay to her one-half of the bequest of \$25,000 to her father. The trial court held that it went into the residue of the estate, and was bequeathed by the residuary clause of the will. The correctness of the ruling presents the only question for our determination.

The deceased, George Phelps, left a large estate, and his will contained many substantial bequests to relatives. To the appellant he gave \$10,000, and to her husband he gave \$5,000. He gave to the appellant's sister, Viola Phelps Carpenter, \$20,000, and to her husband he gave \$5,000. The specific bequest to these two nieces and their husbands amounted in the aggregate to \$40,000. The bequest to the appellant and her sister and to their husbands contained the farther provision that, in the event said devisees did not survive the testator, the sum bequeathed to each should go to the heirs of the original devisee. In a bequest to another niece, and in bequests to relatives of his first wife, it was provided that, in case they did not survive him, the bequests made to them were to go to their children. Bequests made to other nephews, nieces, and other relatives contained no such provision, but the will contained a residuary clause, which is as follows:

Item Ninth. I give, devise and bequeath all the rest,

residue and remainder of my estate, real, personal and mixed, wheresoever situated, together with any of my estate that may fail, for any reason to pass under the foregoing terms and conditions of this my will, and together with all funds placed in trust upon the expiration of said trusts, to the following named persons and in the following shares:

To Viola Phelps Carpenter one-half ($\frac{1}{2}$) thereof, to Lillian Phelps Merrill one-fourth ($\frac{1}{4}$) thereof, to Thomas F. Phelps, son of my brother William Phelps, one-eighth ($\frac{1}{8}$) thereof, and to Frederick S. Phelps, son of my brother Nathan Phelps, one-eighth ($\frac{1}{8}$) thereof. Should any of said residuary legatees or devisees above named die before my death leaving no heirs of his or her body, then I give, devise and bequeath the share, to which such residuary legatee or devisee would be entitled, if living, to the survivor or survivors of said residuary legatee and devisee and in the proportions above named, or all thereof as the case may be. Should any of my residuary legatees and devisees above named die before my death leaving heirs of his or her body surviving, then I give, devise and bequeath the share of my estate to which said residuary legatee or devisee would be entitled, if living, to the heirs of his or her body as the case may be, share and share alike.

Under the rule of the common law the appellant would not take because the beneficiary named in the will died before the decease of the testator. But section 3281 of the Code provides that: "If a devisee die before his testator, his heirs shall inherit the property devised to him unless from the terms of the will a contrary intent is manifest." The appellant contends that, under this statute, she inherits one-half of the \$25,000 devised to her father. The appellant can not invoke the aid of the statute nor inherit thereunder, if the terms of the entire will manifest an intent on the part of the testator to dispose of his estate without the aid of the statute and contrary thereto. That he did not rely upon the statute, whether he had it in mind or not, is very evident; for in the bequest to which

we have called attention he expressly provided that, if the devisee did not survive him, the sum bequeathed should go to the heirs or children of said devisee. From other bequests it is equally as plain that he did not want the heirs of the devisees to inherit because he not only made no provision therefor, but undertook to dispose of the sum so devised in the residuary clause of his will. He gave to the residuary legatees all parts of his estate which for any reason did not go directly to the person named in the will. He intended the bequest to his brother Thomas as a personal one, and undertook to fully provide for the appellant and her sister by the specific devisees to them and their husbands and by the residuary clause. The statute itself says that it shall not be effective where by the terms of the will a contrary intent is manifest, and the residuary clause of the will says that, if any part of the estate shall fail to pass in accordance with the terms and conditions of the will, such part shall pass under said residuary clause. It is idle to say that wills could not be made but for the law, and that the statute in question became a part of the will. As we have already said, the aid of the statute can not be, and never is, invoked where the intent of the will is manifest. The statute clearly can not be ingrafted upon a will for the purpose of making uncertain the meaning of language that would otherwise be certain. The will shows clearly that the testator intended to have his estate go to certain persons, and that he carefully provided for substitution where it might become necessary, and this without reference to or regard for the statute in question.

We think the judgment below right, and it is *affirmed*.

**STATE OF Iowa, Appellant, v. CHARLES DELAHOYDE and
GEORGE MARX.**

Intoxicating liquors: SALE BY CORPORATION: STATUTES. Under the present statutes an Iowa corporation may lawfully engage in selling intoxicating liquors under the provisions of the Mulet Law.

Appeal from Marshall District Court.—Hon. C. B. Bradshaw, Judge.

TUESDAY, MAY 10, 1910.

By direction of the court the defendants were acquitted of the crime of keeping a liquor nuisance. The State appeals.—*Affirmed.*

*H. W. Byers, Attorney-General, and Charles W. Lyon,
Assistant Attorney-General, for the State.*

Bradford & Johnson and R. B. Alberson, for appellees.

SHERWIN, J.—The case was submitted to the trial court on an agreed statement of facts, from which it appeared that both defendants were employees of the Des Moines Malting Company and that as such employees they sold to certain persons intoxicating liquors; that the Des Moines Malting Company was an Iowa corporation authorized by its articles of incorporation to buy, sell, and keep for sale intoxicating liquors according to law; that at the time involved herein the mulet law was in force in Marshalltown, Iowa, and that the Des Moines Malting Company had complied with all of its requirements, and

was duly authorized to sell intoxicating liquors in Marshalltown, if a corporation can be so authorized.

The only question for our determination is whether an Iowa corporation could at the time lawfully engage in selling intoxicating liquors under the provisions of the mulct law. Since the trial of this case below the Legislature has removed any doubt as to the power of corporations in the future by the enactment of chapter 143, Acts 33d General Assembly. The state contends that the sale of intoxicating liquors is not in any sense a lawful business, and that a corporation organized under the law of this state can engage in a lawful business only. While there is language in some of the opinions of this court and some language in the statute itself which tends to support the state's claim on this point, it is, we think, true that sales of liquor made under the protection of the mulct law are legal. Such was the direct holding in *McKeever v. Beacom*, 101 Iowa, 173, and we see no possible escape from the logic of that opinion. The statute authorizes an incorporation for any lawful business, and gives to such corporations the same powers in respect to acquiring and transferring property, and making contracts in general, as are possessed by natural persons. Code, sections 1607-1609. These sections of the Code would alone authorize a corporation to engage in the liquor business under the mulct law. But it is not necessary to rest thereon for such authority, for the mulct statute itself by fair implication authorizes the traffic by corporations. Code, sections 2432, 2460.

The judgment of the trial court is manifestly right, and it is *affirmed*.

STATE OF IOWA, Appellee, v. FRED OTTLEY, Appellant.

Criminal law: INDICTMENT: SUFFICIENCY. Neither a failure of the 1 clerk of a grand jury to include in the minutes of the evidence a statement that the witnesses were sworn before testifying; nor failure of the witnesses to sign the minutes of their evidence; nor failure of the clerk of courts to place a filing mark upon the sheets containing the minutes of the evidence, where the indictment to which the evidence is attached is marked filed, are fatal to the indictment.

Same: FAILURE TO FILE EXHIBITS. Failure to file exhibits with the 2 clerk of courts which were used before the grand jury is not ground for setting aside the indictment; nor will such failure render the exhibit inadmissible upon the trial.

Criminal law: FORGERY: EVIDENCE. The testimony of an accomplice, 3 on a prosecution for forgery, as to procuring a third person to sign the name of another to the forged instrument, which was shown to have been in pursuance of a previous arrangement between the witness and the accused, was competent as against the accused.

Same: REASONABLE DOUBT: SUFFICIENCY OF PROOF: INSTRUCTION. The 4 law does not require that every fact essential to conviction of a crime shall be separately considered, or proved beyond a reasonable doubt when considered separately; as the State is not required to divide its case into sections or to separate the essential facts and make each one stand alone; but every material allegation of an indictment is an essential fact and must be proven beyond a reasonable doubt when considered in connection with the whole evidence in the case to warrant conviction; and if upon a consideration of all the evidence in the case there is a reasonable doubt as to any one of such material allegations there can be no conviction.

*Appeal from Linn District Court.—Hon. MILO P. SMITH,
Judge.*

TUESDAY, MAY 10, 1910.

THIS is a prosecution for forgery. There was a verdict of guilty and judgment thereon. Defendant appeals.—*Reversed.*

J. C. Leonard, for appellant.

H. W. Byers, Attorney-General, and *Charles W. Lyon*, Assistant Attorney-General, for the State.

EVANS, J.—The defendant was indicted jointly with one Chrisler for forgery. Chrisler pleaded guilty, and became a witness for the state as against his codefendant, Ottley. The alleged forgery consisted of the making of a note for \$80 and signing the name of one A. C. Wilcox thereto. The actual signing was done by Chrisler alone. The note was signed for the purpose of securing a loan from one Lawler. To secure the note, Chrisler executed at the same time a chattel mortgage on a buggy belonging to Ottley and a horse belonging to one Heffner, both of which were temporarily in his possession at the time the note and mortgage were made. Chrisler testified that this was all done in pursuance of an arrangement between him and Ottley, whereby Chrisler was to obtain the money for Ottley in this manner. He obtained a check from Lawler from the proceeds of the loan, and turned the check over to Ottley according to his testimony. Many circumstances were put in evidence by the state tending to corroborate the testimony of Chrisler in this respect. Lawler insisted that the wife of Wilcox should sign the mortgage. Thereupon Chrisler procured one Margaret Morris to impersonate such person, and to join with him in the execution of the chattel mortgage, and to sign the same as Margaret Wilcox, the purported wife of A. C. Wilcox. Chrisler testified that this also was done after a consultation with Ottley on the subject, and in pursuance of

the plan then mutually agreed upon. The case is presented here upon ten errors relied on for reversal.

I. The first five points relied on are so closely related that we will consider them together. It appears from the record that when the indictment was returned,

<sup>1. CRIMINAL
LAW: indict-
ment: suffi-
ciency.</sup> the purported minutes of the evidence heard before the grand jury were attached to the same. The clerk, however, applied his filing mark upon the indictment only. That is to say, he did not place a filing mark upon the particular sheets of paper which contained the minutes of the evidence. It also appears that the minutes of evidence as thus returned contained no affirmative statement that the witnesses were sworn, nor did these minutes purport to be signed by the witnesses. It is contended by the defendant, in effect, that the failure of the clerk of the grand jury to include in the minutes of the evidence a statement that the witnesses were sworn was fatal to the indictment. The same claim is made with reference to the failure of the witnesses to sign the minutes of their evidence, and also with reference to the failure of the clerk to enter a separate filing mark upon the minutes of the evidence as distinguished from the indictment. None of these points are well taken. Section 5254, Code, provides that an "indictment can be found only upon evidence given by witnesses produced, sworn, and examined before the grand jury," etc. Under this section of the statute, it was the duty of the grand jury to put all witnesses examined before it under oath. But there is no provision of the statute which requires the grand jury to make an affirmative showing in the minutes of evidence presented that the witnesses were sworn. The omission to make such affirmative statement in the minutes of the evidence was therefore not available to the defendant as ground for dismissing the prosecution upon motion at the close of the evidence. This is the only manner in

which the question was raised. *State v. Easton*, 113 Iowa, 516; *State v. De Groote*, 122 Iowa, 661. Nor was the fact that witnesses failed to sign their testimony fatal to the indictment. We have heretofore held that the requirement of section 5258 in this regard is directory rather than mandatory. *State v. O'Malley*, 132 Iowa, 696.

As to the point that the clerk failed to place a filing mark upon the sheets containing the minutes of evidence, this is also without merit, as has been frequently held heretofore. The minutes of the evidence were attached to the indictment, and one filing mark was sufficient for the whole. *State v. Doss*, 110 Iowa, 713; *State v. Cross*, 95 Iowa, 629; *State v. Craig*, 78 Iowa, 637; *State v. Briggs*, 68 Iowa, 416.

II. The next complaint is that the alleged forged note was used as an exhibit before the grand jury, and that it was not filed as an exhibit with the clerk. Section

a. SAME: failure to file exhibits. 5258 requires that the exhibits be filed with the clerk. Granting that the note in question should have been filed with the clerk as an exhibit, and that it was not so filed, this failure was not a ground for setting aside the indictment. *State v. O'Malley*, 132 Iowa, 696. Nor would such failure render the note inadmissible in evidence. *State v. Mullanern*, 130 Iowa, 46; *State v. Mullenhoff*, 74 Iowa, 271; *State v. Boomer*, 103 Iowa, 106. Indeed, it does not appear from this record whether the note was filed by the clerk or not. Assuming that it was not, no complaint was ever made by the defendant upon that ground until he moved for a directed verdict at the close of the evidence.

III. Complaint is made because the court permitted Chrisler to testify to the arrangement made by him with

3. CRIMINAL LAW: forgery: evidence. Margaret Morris, whereby she was to impersonate Mrs. Wilcox in the transaction.

The general ground of objection is that this testimony was incompetent as against the defendant

because it was evidence of a conversation between others not in his presence. Chrisler had already testified that this arrangement with Margaret Morris was made in pursuance of a previous conversation between him and the defendant Ottley. The objection was therefore without any merit. The evidence was admissible under elementary rules of evidence, and no citation of authorities is needed in support of it. See, however, *State v. McCahill*, 72 Iowa, 111; *State v. Donavan*, 125 Iowa, 239; *State v. Crofford*, 133 Iowa, 478; *State v. Arthur*, 135 Iowa, 48.

IV. Defendant complains, also, of instructions five and seven as given by the trial court. No specific error is pointed out to us in instruction five. The instruction is preliminary only, and is good as far as it goes. The most that can be said against it is that it does not fully cover the subject.

4. SAME: reasonable doubt: sufficiency of proof: instruction.

We see nothing to be gained by entering into a discussion of it. The court undertook to supplement this instruction with instruction No. 7, and we direct our attention to such instruction, which is as follows: "(7) The reasonable doubt hereinbefore explained does not mean a reasonable doubt that any one point or proposition that it is necessary for the state to establish has not been so established by the evidence; but it means a reasonable doubt of the guilt of the defendant after a careful consideration of the entire case. Though you may entertain a reasonable doubt of the sufficiency of the state's evidence to establish one or more material allegations of the indictment necessary to be by it established, still you are not warranted in acquitting the defendant if upon a full and careful consideration of the entire case you entertain no reasonable doubt of his guilt." It must be said that the foregoing instruction is clearly erroneous. It is not necessary that every circumstance shown in evidence by the state shall be proved beyond a reasonable doubt, but it is necessary that every fact which

is essential to a conviction of the defendant must be so proved. This rule has been frequently announced by this court in cases where the prosecution is based upon circumstantial evidence alone. *State v. Cohen*, 108 Iowa, 208; *State v. Blydenburg*, 135 Iowa, 278; *State v. Clark*, 145 Iowa, 731. This rule does not require that every essential fact shall be separately considered, or that it shall be proved beyond a reasonable doubt as separately considered. Evidence of an essential circumstance standing alone may not be strong, and yet it may derive such support from other circumstances so connected with it and related to it as to remove all reasonable doubt. *State v. Cohen*, *supra*. All proper evidence is to be considered in the light of the whole case. The state is not required to divide its case into sections or to separate the essential facts, and to make each one stand alone. The rule remains, however, that, when so supported, the jury must find every fact essential to a conviction established beyond a reasonable doubt. Otherwise there can be no conviction. Every "material allegation" of an indictment is an essential fact, and, if upon a consideration of all the evidence in the case there is reasonable doubt as to any one of such material allegations, there can be no conviction. In the portion of the instruction complained of, the distinction here made was manifestly in the mind of the trial court, but it failed of proper expression. The instruction as presented to the jury can not be approved, nor can we say that it was without prejudice. Exactly in point in *State v. Kimes*, 145 Iowa, 346. For this error, there must be a reversal, and a new trial ordered.—*Reversed and remanded.*

PETER SAUSER v. W. S. KEARNEY, Appellant.

Contracts: DIVISIBILITY: AGREEMENTS IN RESTRAINT OF TRADE. In this action the plaintiff owned a lot on which he contemplated conducting a lumber business and had contracted for a stock of lumber, paid the freight, and placed a portion of the lumber on the lot. Thereafter he contracted to sell the lumber so purchased and not to re-engage in the business at that place for a term of two years. *Held*, that the contract of sale was not merely of a right to engage in the business but was valid under the rule permitting one to dispose of his business and to agree not to re-engage therein for a specified time and was not divisible, one part relating to the sale of the lumber and the other to refrain from re-engaging in the business.

Same: STATUTE OF FRAUDS. The statute of frauds requiring contracts which are not to be performed within a year to be in writing does not apply, where the same contemplates performance by one of the parties within a year: As where one party contracts to sell his stock and not to re-engage in the business for a series of years, the other party agreeing to pay the consideration within a year.

Same: AGREEMENTS IN RESTRAINT OF TRADE: VALIDITY. Where one has purchased a stock of goods and has paid for the same or obligated himself to pay therefor, a portion of which has been delivered and placed upon the premises whereon he contemplated conducting the business, a contract of sale of the goods with an agreement not to re-engage in the business is not invalid because of an agreement to forego the mere privilege of engaging in a prospective business.

Same: ACTION FOR RECOVERY OF CONSIDERATION. Under a contract to purchase a stock of goods and to pay an additional sum in consideration that the seller shall not re-engage in the business for a series of years, both the purchase price of the stock and the additional sum to be presently paid, the seller may maintain an action to recover the sum agreed upon for refraining from engaging in the business, although such time has not expired.

Oral contracts: DETERMINATION UPON CONFLICTING EVIDENCE. Conflicting oral evidence concerning the terms of a verbal contract presents a question for the jury.

Appeal from Dubuque District Court.—Hon. ROBERT BONSON, Judge.

TUESDAY, MAY 10, 1910.

ACTION to recover \$500 as the amount remaining due and unpaid, under a contract by which plaintiff sold a stock of lumber to defendant, and agreed not to engage in the lumber business in the town of Cascade, in competition with defendant, for the term of two years. On a trial to a jury there was a verdict for plaintiff, and from judgment on such verdict defendant appeals. Pending the appeal there has been a substitution of an administrator for the deceased plaintiff, but we shall allow the title of the action to remain as it was when the appeal was taken.—*Affirmed.*

William Graham, J. B. Utt, and James B. Graham, for appellant.

Matthews & Frantzen and T. J. Fitzpatrick, for appellee.

McCLAIN, J.—The evidence on the trial tended to show that in 1903 defendant was engaged in the lumber business in the town of Cascade, and plaintiff was taking steps to start a rival yard on a lot which he owned in that town, and had proceeded so far as to purchase a stock of lumber, a considerable portion of which had arrived, and was in cars ready to be unloaded, while a few wagonloads had in fact been hauled to plaintiff's lot. Defendant, having been advised of plaintiff's purpose, undertook to make a sale of his business to plaintiff, but as a result of the negotiations it was agreed that plaintiff should sell to defendant the lumber which he had bought, and agree not to engage in the lumber business in the town of Cascade for two years in consideration of the payment to him by defendant of \$500 in addition to the cost price to plaintiff of the lumber which he had already

bought. The defendant paid the cost price of the lumber and took possession of it, but failed to pay the additional \$500, and soon afterwards sold his business to another. This action is to recover the balance of the agreed consideration for the contract.

I. The principal contention for appellant is that under the evidence it appeared that the contract involved a leasing of plaintiff's lot to defendant for two years, and

i. CONTRACTS:
divisibility: in
agreements in
restraint of trade.
that such leasing, not being evidenced in writing, was void under the statute of frauds, and that thereby the whole contract

was invalidated, and it is claimed that the court erred in various rulings and instructions on this subject. We think the court was justified under the pleadings and evidence in trying the case on the theory that the contract did not involve the leasing to defendant of the use of plaintiff's lot for two years, but that what was testified with relation to the leasing of the lot had reference only to the fact that plaintiff was to be deprived, under the contract, of the right to use the lot for conducting a lumber business thereon for the period of two years. It seems to have been assumed that plaintiff could not in fact make any other profitable use of his lot than as a lumber yard, but the evidence expressly negatives any understanding that plaintiff was to surrender possession of the lot to defendant, or that defendant was to have anything to do with the possession of the lot, or any control over it, save that plaintiff was not to use it for a lumber yard. This view which the court evidently took of the evidence, and as we think was justified in taking, eliminated entirely any question with relation to the provision of the statute of frauds that no lease for a longer period than one year shall be enforceable, unless evidenced in writing. There was not a divisible contract—one part relating to the purchase of lumber, the other to the leasing of a lot—but there was plainly one indivisible con-

tract, under which defendant was to pay an aggregate sum to the plaintiff, to be determined by adding \$500 to the price of the lumber, and plaintiff was to turn over the lumber to defendant, and abstain for two years from engaging in the lumber business in the town, involving incidentally his use of his lot for that purpose.

II. It is further contended that the contract was one not to be performed within one year, and therefore invalid under the provision of our statute of frauds that no evidence of such contract shall be received unless in writing. But the settled rule in this state, and as we understand the authorities, in other states, is that such a provision relates to contracts not to be performed on either side within one year. That was the question involved in the case of *Smalley v. Greene*, 52 Iowa, 241, relating to a contract not to engage in the practice of law in a specified place, and the court held that, although the agreement not subsequently to practice law in that locality could not be performed within one year, nevertheless, as the payment of the consideration was to be made at once, the contract was to be fully performed on the one side within a year, and the statute of frauds did not prevent the recovery by the plaintiff of the consideration to be paid, although the contract was not in writing. Our attention is not called to any case indicating a departure from this rule.

III. Some question is raised for appellant in his reply argument as to the validity of an agreement to forego the mere privilege of engaging in a prospective business.

3. SAME: agreements in restraint of trade: validity. It is sufficient to say that the business of conducting a lumber yard was not purely prospective so far as plaintiff was concerned. He owned a lot on which the business could be conducted, had gone to the trouble and expense of selecting a stock of lumber, for which he had paid, or was under obligation to pay, the purchase price, had paid the freight for the

transportation of the lumber to the town, and had placed a small portion of it upon the lot. He had therefore opened the lumber business in the town, and it can not be said that his contract not to engage in the business was merely a sale of a prospective right which any one would have to engage in the business in that town if he saw fit. Counsel for appellant cite some authorities as to the invalidity of contracts to suppress competition in business, but no such question is before us. The right of a person engaged in a business in a particular locality to sell out such business and agree not to engage in it for at least a limited period is too well established by our cases to justify an elaboration of the question. *Swigert v. Tilden*, 121 Iowa, 650; *Marshalltown Stone Co. v. Des Moines B. M. Co.*, 114 Iowa, 574.

The contention that the action was premature because brought before the expiration of the two-year period during which plaintiff was not to engage in the lumber busi-

ness is not applicable to the evidence. It appears without conflict that the consideration was to be paid at once, and that it was in its nature indivisible. The fact that defendant did pay plaintiff the purchase price of the lumber, and postponed temporarily the payment of the balance, does not even tend to show in itself that there was a divisible contract. We see no ground for the contention therefore that the \$500 which was agreed to be paid in addition to the price of the lumber was not payable until after the expiration of the two-year period. Surely a valid contract can be made for the present payment of a lump sum in consideration of an agreement not to engage in a business for a specified period, and the payment may surely be enforced as an obligation already matured, although the time during which the other party agrees to remain out of business has not yet expired. A contract may be matured and enforceable on one side, although it involves

* SAME: action for recovery of consideration.

obligations executory in their nature on the other. No authorities need be cited in support of so elementary a proposition. The case of *Norton v. Preston*, 15 Me. 14 (32 Am. Dec. 128), relied upon for appellant, relates to the effect of part performance as taking a contract for the sale of real estate out of the statute of frauds. Under our statute it would have no bearing in this state in a case involving such a contract, and it has no application whatever to the question whether the contract in controversy is one not to be performed within a year under our statutory provision.

IV. No error was committed by the court in failing to so instruct the jury that they might deduct from the amount due from plaintiff under the contract the rental

value of his lot for two years. As already indicated, the defendant did not contract for the possession of the lot, and therefore had been deprived of nothing to which he was entitled. He admits in his own testimony that no right of possession was to accrue to him under the contract. The complaint that the court improperly left it to the jury to construe the contract between the parties is without foundation, as an examination of the instructions shows that the jury was directed only in this respect to determine whether the contract relied upon by plaintiff was in fact made, and to find the terms and conditions thereof. There was no occasion for construction; the only question was of fact—what the terms of the contract really were, if any was made—and that question was properly left to the jury under conflicting parol evidence as to the various conversations between the parties. Other complaints as to instructions given, and as to refusals of instructions asked, are sufficiently disposed of by the previous announcement of our conclusions on questions of law argued for appellant.

The judgment of the trial court is *affirmed*.

W. T. S. BEAR ET AL., Appellants, v. THE CITY OF CEDAR RAPIDS, The Mayor and City Council Thereof, et al., Appellees.

Municipal corporations: ORDINANCES: LICENSES: SALE OF DAIRY PRODUCTS: INSPECTION OF DAIRIES: STATUTES. Municipal corporations can only exercise such powers as are expressly granted by statute, or such implied powers as are necessary to render available the powers expressly conferred and essential to carry out the purposes of the corporation; and these powers are to be strictly construed.

In the instant case the statutes are reviewed and it is held that neither the statutes nor the rule of the State Board of Health authorize a city, either expressly or by implication, to adopt an ordinance requiring that dealers in milk and cream procure a license, or to require an inspection of dairies or dairy cattle.

Same. Power of a city to require a license of milk dealers is not to be implied from power to punish by a fine or to regulate the milk business; nor does such implied power exist by reason of the fact that the State itself has attempted to regulate the matter and has provided for licensing the business.

Same: CONSTITUTIONAL LAW: UNIFORMITY OF OPERATION: DELEGATION OF POWER. Even had a city such power the ordinance in question vests a discretion in the city Board of Health to arbitrarily grant or refuse a license, thus destroying the guaranty of equal opportunity, and is an unlawful delegation of power.

Injunction: RESTRAINT OF VOID ORDINANCE. A milk dealer affected by a void ordinance requiring all persons selling milk to procure a license after inspection of the dairy at the dealer's cost, and imposing penalties for its violation, may enjoin the enforcement of the ordinance.

*Appeal from Linn District Court.—Hon. MILO P. SMITH,
Judge.*

TUESDAY, MAY 10, 1910.

SUIT in equity to enjoin the enforcement of a city ordinance. A temporary writ of injunction issued as

prayed, which, upon defendants' motion, was dissolved. Plaintiffs appeal.—*Reversed and remanded.*

Deacon, Good, Sargent & Spangler, for appellants.

Redmond & Stewart and *F. C. Byers*, for appellees.

DEEMER, J.—The city council of defendant city adopted an ordinance, whereby it assumed the power and authority to require any and all persons selling milk or cream within the city limits of said city to apply for a license therefor from the city, and assumed the power to issue such license and to determine to whom such licenses should be issued. The city by said ordinance, also assumed the right and authority to inspect the herds of such licensees from time to time by their veterinarian or other officer, and in such inspection to use what is known as the tuberculin test as a diagnostic agent for the detection of tuberculosis, and also the licensees were prohibited from selling milk or cream within said city while any contagious disease existed in the family of the licensee or the family of the keeper of the herd. The licensee was required to pay a license fee, and in addition to pay all costs of inspecting his herd, including the cost of applying the tuberculin test. A penalty of not less than \$1 nor more than \$100 was provided for violation of the ordinance.

Defendant city is organized under what is known as the commission plan of government, and its city council is the board of health of the city. On March 27, 1909, the council passed the ordinance in question, its title being: "An ordinance providing for inspection and testing of milk and cream, dairy, dairy herds, and to license and regulate the sale of milk and cream in the city of Cedar Rapids." This ordinance provided that:

1. **MUNICIPAL CORPORATIONS:**
ordinances:
licenses: sale
of dairy products:
inspection of dairies:
statutes.

All persons desiring to sell milk or cream within the limits of the city must make application in writing under oath to the board of health of said city for a license to carry on said business, the application to state the exact location where applicant's cows were kept, their number, whether owned or kept by the applicant, and the manner in which the applicant intended to dispose of his milk and cream; that by the filing of said application, said applicant authorized said city to inspect applicant's dairy and dairy herd, and requires the board of health of said city, through its veterinarian or other officer, to make such inspection, and to use in such inspection what is commonly known as the tuberculin test, and to tag each animal in such a way as to make a permanent record of such inspection and its result.

It also provided that:

Said board of health, after investigation, 'whether from a consideration of such report, or from other sources, shall adjudge and determine what applicant or applicants may be entitled to obtain a license to sell milk and cream within said city,' and shall license such persons so selected, such licensee to pay the cost of inspecting his dairy and dairy herd, and for one dollar for such license and each renewal thereof; that all veterinarians and officials of said board of health shall have the right at any and all times to enter the premises of any person so licensed to inspect the dairy and dairy herd of such licensee, and said board is required to cause such inspection to be made from time to time, and is required to cause such inspection and test to be made at least once in each year.

The ordinance further provides that:

No licensee 'will be permitted to sell, keep for sale, or offer for sale, any milk or cream from said designated cows or herds when measles, chicken pox, scarlet fever, diphtheria, typhoid fever, small pox or other infectious or contagious disease exists, either at the place where said cows or herd are kept or in the family of the keeper of the same, until permitted so to do by the board of health, after proper fumigation under supervision of said board,'

and provides that a violation of any of the provisions of the ordinance shall be punishable as a misdemeanor and subject the person so violating it to a fine not to exceed \$100 and imprisonment, and to a cancellation of his license at the discretion of said board of health.

We have not set forth the entire ordinance, for it is long, and many parts of it are unimportant, and need not be considered in this opinion. Appellants contend that this ordinance is invalid for the following reasons: "(1) No authority to enact said ordinance has ever been conferred upon the city of Cedar Rapids by the Legislature of Iowa, but on the contrary, the authority to license city milk dealers and dairymen is conferred by chapter 13 of the Code of Iowa of 1897 upon the Dairy Commissioner of the State of Iowa. (2) That the ordinance is unreasonable in its provisions. (3) That the ordinance is not of a general character, but grants to the board of health discretion to determine who of the applicants who comply with its provisions shall receive licenses. (4) That the ordinance is void because in violation of article 14 of the Constitution of the United States, and section 6, article 1, of the Constitution of Iowa."

The statutes of the state do not confer express powers upon a city to regulate, license, suppress, or restrain the sale of milk, and the only sections which are relied upon by appellee are 680, 2568, 2525, and 4989 of the Code, and sections 4999a22 and 5028j of the Code Supplement of 1907. There is also a rule of the State Board of Health upon which some reliance is placed, to which we will hereafter make reference. Section 680 reads as follows: "Municipal corporations shall have power to make and publish, from time to time, ordinances, not inconsistent with the laws of the state, for carrying into effect or discharging the powers and duties conferred by this title, and such as shall seem necessary and proper to provide for the safety, preserve the health, promote the

prosperity, improve the morals, order, comfort and convenience of such corporations and the inhabitants thereof, and to enforce obedience to such ordinances by fine not exceeding one hundred dollars, or by imprisonment not exceeding thirty days." Whilst this statute is very general in its terms, it does not give the city power to do more than impose fines. Thereunder it can not license or provide any other remedy than that authorized by the statute itself. *Des Moines v. Gilchrist*, 67 Iowa, 212; *Foster v. Brown*, 55 Iowa, 686; *Henke v. McCord*, 55 Iowa, 378; *City of Mt. Pleasant v. Breeze*, 11 Iowa, 399; *Burlington v. Keelar*, 18 Iowa, 59; *City of Burlington v. Bumgardner*, 42 Iowa, 673; *City of Chariton v. Barber*, 54 Iowa, 360; *Keokuk v. Scroggs*, 39 Iowa, 447. So that we find no authority under this section for the passage of the ordinance in question.

Chapter 13, title 12 of the Code provides for the appointment of a dairy commission, and section 2525, which is found in that title, reads in this wise: "Any person or corporation who shall sell milk or cream from a wagon, depot or store, or sell or deliver milk or cream to a hotel or restaurant or boarding house, or any public place in any such city, shall be considered a city milk dealer. No such city milk dealer shall sell milk or cream from a wagon, depot or store in any such city without a written permit from the commissioner for each wagon, for which he shall pay annually one dollar. All permits shall expire on the fourth day of July of each year, and no permits shall be issued for less than one dollar." As the next section is important, we copy it here, although somewhat out of order. It is as follows: "He or his agent may open any can or vessel containing milk or cream offered for sale in such city, and inspect its contents and take samples therefrom for testing or analysis, and any city milk dealer or employee of such milk dealer, or any other person who shall resist or interfere with the commis-

sioner or his agent in the performance of his duties in executing any of the requirements of this chapter, shall be guilty of a misdemeanor and punished as provided in this chapter." Code, section 2526.

In the same connection we here quote, sections 2522 and 2524, reading as follows:

Section 2522. Every city milk dealer, or every person furnishing milk or cream to such dealer, or to employee of such milk dealer, and every person or corporation or the employee of such person or corporation, who operates a creamery, cheese or condensed milk factory, or reworks or packs butter, shall maintain his premises and utensils in a clean and hygienic condition, and shall make, upon blanks furnished by the dairy commissioner, such reports and statistics as may be required for the purpose of compiling statistics authorized by this chapter, and such dealer, owner, operator or business manager shall make such returns and reports in the manner and in the time prescribed by the commissioner, and certify to the correctness thereof.

Section 2524. The commissioner may appoint agents in any city having over ten thousand inhabitants to collect from each dealer, not more than four times each month, samples of milk offered for sale therein. The agent shall make an accurate test of each sample received by him, and keep a true record thereof, with the name and location of the person from whom it was obtained, and report his work in detail to the commissioner, the compensation therefor not to exceed three dollars for each day actually employed therein.

It is manifest that there is nothing in these sections authorizing the passage of such an ordinance as the one now before us:

Section 4989 reads as follows:

If any person shall sell, exchange, or expose for sale or exchange, or deliver or bring to another, for domestic or potable use, or to be converted into any product of human food, any unclean, impure, unhealthy, adulterated,

unwholesome or skimmed milk, or milk from which has been held back what is commonly known as strippings, or milk taken from an animal having disease, sickness, ulcers, abscess or running sore, or which has been taken from an animal within fifteen days before or five days after parturition; or if any person, having cows for the purpose of producing milk or cream for sale, shall stable them in an unhealthy place or crowded manner, or shall knowingly feed them food which produces impure, unwholesome milk, or shall feed them distilled glucose or brewery waste in any state of fermentation, or upon any substance in a state of putrefaction or rottenness or of an unhealthy nature, or shall sell or offer for sale cream which has been taken from milk the sale of which has been prohibited, or who shall sell or offer for sale, as cream, an article which shall contain less than the amount of butter fat as prescribed in this chapter: or if any person shall sell or offer for sale any cheese manufactured from skimmed milk, or from milk that is partly skimmed, without the same being plainly branded, stamped or marked on the side or top of both cheese and package, in a durable manner in the English language, the words 'skimmed-milk cheese' the letters of the words to be not less than one inch in height and one-half inch in width. . . .

This confers no authority whatever upon the city. It is a penal statute pure and simple, and does not undertake to confer power upon any department or subdivision of the state.

Section 4999a22 of the Code Supplement of 1907 is a paragraph of the pure-food law, and simply defines adulteration. It has no possible reference to the question before us. Section 5028j of the same Supplement reads:

That the importation of registered cattle or cattle eligible to registry for breeding and dairy purposes into this state is hereby prohibited, except when such cattle are accompanied with a certificate from an inspector whose competency and reliability are certified to by the authority charged with the control of domestic animals in the state from whence the cattle came, certifying that said cattle

have been examined and subjected to the tuberculin test within sixty days next preceding the date of such importation, and are free from disease.

It manifestly confers no powers upon a city.

We have already referred to a resolution of the State Board of Health. That resolution reads as follows:

When Asiatic cholera, epidemic cerebro-spinal meningitis, smallpox, diphtheria (including membranous croup), scarlet fever, measles or tuberculosis exists in any house or dwelling occupied by a dealer or seller of milk or other dairy products, he shall discontinue to give, sell or distribute such products to any person, or to creameries or butter factories, and such milk or dairy products shall not be removed from the infected or quarantined premises until a written permit is granted therefor by the mayor or township clerk, and countersigned by the health officer. No person who attends cows, or does the milking, or who has care of milk vessels, or who manufactures or handles butter or other dairy products, or has for sale or distribution butter, milk, or other dairy products, shall be permitted to enter a premises wherein exists any of the diseases named herein, nor shall he come in contact either directly or indirectly with any person who resides in, or upon or is an occupant of such infected or quarantined place or premises. Rule 21, State Board of Health, 1907.

This seems to be complete and perfect in itself, and it confers no powers upon the city acting as such or as a board of health.

Section 696 of the Code provides that:

They shall have power to prevent injury or annoyance from anything dangerous, offensive or unhealthy, and to cause any nuisance to be abated; to provide for the destruction of weeds and other noxious growths upon any of the lots therein; to provide for the immediate seizure and destruction of tainted or unsound meat or other provisions; to establish all needful regulations as to the management of packing and slaughter houses, renderies, tal-

low chandleries and soap factories, bone factories, tanneries, and manufactories of fertilizers and chemicals, within the limits of such cities or towns; to regulate and restrain the deposit and removal of all offensive material and substances, and the engendering of offensive odors and sights therefrom, so as to protect the public against the same; to establish and regulate slaughter houses; and, in cities having five thousand or more inhabitants, to build and control the same.

These are all the provisions of the written law applicable to the case, and it is manifest that none of them give, either to the city or to the board of health, power to license milk dealers. That power seems to be conferred on the dairy commissioner; and the matter of tuberculin tests seems to be reposed upon the state veterinarian. The universal rule, not only for this state but everywhere, is that: "Municipal corporations can exercise such powers only as are expressly granted, and such implied ones as are necessary to make available the powers expressly conferred and essential to effectuate the purposes of the corporation, and these powers are strictly construed." Or, as stated in other cases, cities of this state have these powers: First, those granted by the Legislature in express words; second, those necessarily or fairly implied or incident to the powers expressly conferred; and, third, those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable. *Heins v. Lincoln*, 102 Iowa, 77; *Burroughs v. Cherokee*, 134 Iowa, 429.

Even if the city has power to punish by fine or to regulate the milk business, this would not authorize it to exact a license. *City v. Bumgardner, supra*. No implied power exists, for the reason that the ^{2. SAME.} state itself has attempted to regulate the matter, and has provided for licensing the business. *Iowa City v. McInerey*, 114 Iowa, 592. Moreover, the matter of tuberculin tests seems to be covered by section 5028j

of the Code Supplement, and this does not in any manner refer to cities.

Again, even if it were permissible for either the city or the board of health to exact a license, attempt is made by the ordinance to vest a discretion in the board of health

which the law does not permit, and which would be intolerable in its operation. Under 3. SAME: constitutional law: uniformity of operation: delegation of power. the ordinance the board might arbitrarily and without reason refuse a license to some and grant it to others. All are not placed on an equality, and the guaranty of equal opportunity in the law and under the law is disregarded. If the city had the power to license, it could not delegate this power to another body, leaving to that body a discretion in the matter. This is in effect the holding in *State Center v. Barenstein*, 66 Iowa, 249.

In *Lumber Co. v. Cicero*, 176 Ill. 27 (51 N. E. 784, 42 L. R. A. 704, 68 Am. St. Rep. 163), the Supreme Court of Illinois said: "It prohibits that which is in itself and as a general thing perfectly lawful and leaves the power of permitting or forbidding the use of traffic teams upon the boulevard to an unregulated official discretion, when the whole matter should be regulated by permanent local provisions operating generally and impartially. The ordinance is not general in its operation. It does not affect all citizens alike who use traffic vehicles. It is only persons driving traffic vehicles upon the boulevard without the permission of the board of trustees who are subjected to the penalties of the ordinance. The ordinance in no way regulates or controls the discretion vested thereby in the board. It prescribes no conditions upon which the special permission of the board is to be granted. Thus the board is clothed with the right to grant the privilege to some and to deny it to others. Ordinances which thus invest the city council or a board of trustees with a discretion which is purely arbitrary, and which may be exer-

cised in the interest of a favored few are unreasonable and invalid." See, also, *Yick Wo v. Hopkins*, 118 U. S. 359 (6 Sup. Ct. 1064, 30 L. Ed. 220); *City v. Dudley*, 129 Ind. 112 (28 N. E. 312, 13 L. R. A. 587, 28 Am. St. Rep. 180).

If it were necessary to a disposition of the case we should be inclined to hold that the ordinance is so unreasonable in its provisions that it can not be upheld, but we do not find it necessary to pass upon that question; nor do we consider the question of its constitutionality. It is enough to say that we find no authority in law for such an ordinance, and that if there were such delegation of arbitrary power to the board of health to grant or refuse licenses in its discretion it could not be upheld. We are also constrained to hold that, as the Legislature has provided for licensing and inspecting the business by other officers or bodies, and there is no express power in the city to do so, no implied power should be held to exist.

That plaintiffs may enjoin the enforcement of a void ordinance under the facts shown should not be a question of doubt. Such remedy has frequently been upheld. This

4. *INJUNCTION:* is a day of prevention—preventive medicine, restraint of preventive law, and preventive jurisprudence. *City of Austin v. Austin City, etc.*, void ordi-
nance. 87 Tex. 330 (28 S. W. 528, 47 Am. St. Rep. 114), up-holds the remedy here adopted, and it cites a number of supporting cases. This case is referred to with approval in *Ewing v. Webster City*, 103 Iowa, 226, and is not in conflict with that decision. The ordinance involves something more than a penalty. If enforced, it may mean the destruction of plaintiff's business.

Our final conclusion is that the trial court was in error in dissolving the injunction. The case will therefore be reversed and remanded, for a decree in harmony with this opinion.—*Reversed and remanded.*

WILLIAM FRITZ, Trading as Interstate Nursery Co., Appellee, v. GEORGE W. SNIDER, Appellant.

Appeal: REVIEW ON CERTIFICATE: SUFFICIENCY OF CERTIFICATE. The certification of a cause to the Supreme Court for review involving less than one hundred dollars must cover the entire record upon which the questions to be reviewed arise; a certification merely of questions as to the admissibility of evidence is not sufficient to authorize a review thereof.

Appeal from Jefferson District Court.—Hon. D. M. Anderson, Judge.

THURSDAY, MAY 12, 1910.

APPEAL dismissed.

Rollin J. Wilson, for appellant.

Tisdale & Heindel, for appellee.

LADD, J.—The amount in controversy was less than \$50. The evidence was not taken down in shorthand, and no bill of exceptions filed. The trial judge, at the time judgment was entered, filed a certificate, reciting the issues, certain rulings on the admissibility of evidence, saying had they been the other way, judgment would have been for defendant, and added that: "It is thought of substantial interest in the administration of law governing such a contract to have the decision of the Supreme Court upon the admissibility of evidence offered by the plaintiff and received by the court, and the questions relating thereto are hereby certified to the appellate court by the judge sitting as the district court in and for Jefferson County."

The certificate is not such as is exacted by statute to confer jurisdiction on this court in a suit for breach of contract wherein the amount in controversy, as appears from the pleadings, does not exceed \$100. There can be no review "unless the trial judge shall, during the term in which judgment is entered, certify that the cause is one in which the appeal should be allowed, and, upon such certificate being filed, the same shall be appealable regardless of the amount in controversy." Section 4110, Code. The certificate required is of the cause, and not of the questions, to be decided. The latter must arise in the record as in causes appealable without certificate, and upon appeal are to be presented and disposed of in pursuance of like procedure. *Kistner v. Conery*, 109 Iowa, 439; *Percival v. Strathman*, 112 Iowa, 747; *Wood v. Griffith*, 141 Iowa, 314.

What questions are presented by the record, and the influence of any errors discovered on the outcome, is for this court alone to determine. In the absence of such a certificate as required by statute, and of any record evidencing the rulings complained of, the appeal must be, and it is, *dismissed*.

JOHN H. COX, Appellant, v. JAMES K. CLINE, M. S. MAXIN, JOE DRAKEE, FRANK AMISH, HERMAN VOGEL, W. FREDERICK CLINE, FRANK W. HORA, FRANK PRIZLER.

Negotiable instruments: FRAUD IN EXECUTION OF THE SAME. Where I signatures to a contract for the joint purchase of property, and to a joint note given in settlement therefor, were procured in reliance upon the genuineness of the signature of the first signer and his joint interest therein and liability therefor, but who was subsequently released from liability on the note according to a previous arrangement with him, a fraud was committed upon his associates and the note was thus rendered unenforceable in the hands of the original payee.

VOL. 147 IA.—23.

Same: RESCISSION: PLEADING: WAIVER: APPEAL. To render fraud in
2 the execution of a note given for the purchase price of property
a complete defense to an action thereon, rescission of the contract
should be pleaded; but where the action was tried on the theory
of rescission and without objection to evidence bearing thereon
because rescission was not alleged, and the plaintiff requested
an instruction on the theory that rescission was an issue, there
was a waiver of the defect in pleading, and the omission can not
be urged on appeal as a ground of reversal.

Evidence: CONVERSATION BY TELEPHONE: IDENTITY OF PERSON TALKED
3 WITH. The identity of a person speaking through a telephone
may be established not alone by the sound of his voice, but from
other circumstances as well; as, from the fact that he appeared
at the telephone in response to a call for a person by his name,
admitted that such was his name and was familiar with the trans-
actions inquired about.

In the instant case the evidence of identity is held sufficient to
take that question to the jury and to admit the testimony con-
cerning the conversation over the telephone.

Sale contract: RESCISSION: WAIVER. Where one is informed of an
4 election to rescind his contract, but by his own act precludes the
other party from stating the ground of rescission, there is a waiver
of the necessity of stating the reason for rescission, and the
party seeking to rescind may urge any tenable cause therefor.

Same: NOTICE OF RESCISSION: REASONABLE TIME. The rescission of a
.5 contract for fraud must be within a reasonable time after ascer-
taining the fraud; and what is a reasonable time depends upon
the circumstances of the case.

In the instant case the evidence is held sufficient to take the ques-
tion of notice of rescission within a reasonable time to the jury.

Evidence: HARMLESS ERROR. The admission of evidence bearing
6 only upon matters concerning which no issue was submitted to the
jury was not prejudicial.

Instructions: STATEMENT OF ISSUES. Where the jury is plainly told
7 that unless a certain defense is established the verdict should be
for plaintiff, it was not error, in stating what was essential to
make out such defense, to omit doing so in the alternative form.

*Appeal from Johnson District Court.—Hon. R. P.
HOWELL, Judge.*

THURSDAY, MAY 12, 1910.

ACTION on a promissory note resulted in the dismissal of the petition. The plaintiff appeals.—*Affirmed.*

Wade, Dutcher & Davis, for appellant.

Holbert & Kimball and *Milton Remley*, for appellees.

LADD, J.—I. The note sued on was executed by defendants and one Stover to William T. Tracy, and by him indorsed to plaintiff, "Without recourse." With two others of like amounts, it was executed May 24, 1904, for \$666.66. These were given in pursuance of a contract signed by the parties thereto, by the terms of which each subscriber agreed to pay \$200 for a share in a stallion (there being ten shares), payable in cash or "one-third in one year, one-third in two years and one-third in three years after July 1, 1904, secured by joint and severable negotiable notes with interest." W. P. and John Bradley acted as agents for Tracy, and, as a help to obtaining subscribers for shares, proposed to Joe E. Stover that he head the list on the subscription paper and join in the execution of the notes, and promised that, if he would do so, a share in the horse would be transferred to him without cost, and that he would be released from payment of the notes. Stover yielded to the temptation, though apparently unconscious that in so doing he was assisting in the perpetration of a fraud on his neighbors, and, in pursuance of the arrangement, headed the list of subscribers as well as the signers of the notes. The day after the execution of the latter the Bradleys indorsed on each note "May 25, 1904, Joe Stover, released, credited by \$66.66."

On the representation that Stover had subscribed for a share, and would join in the execution of the notes, becoming liable thereon, the other defendants subscribed,

i. NEGOTIABLE
INSTRUMENTS:
fraud in exec-
ution of the
same.

when, had they known he was to receive a share for the use of his name merely, and to be released from the note, they would not have done so. That this was a fraud on his associates appears from the opinion on the former appeal. 139 Iowa, 128.

The plaintiff acquired the note June 21, 1905, nine days prior to maturity, and it is insisted that the evidence was insufficient to sustain the finding of the jury that he was not a holder in good faith. We held otherwise on the former appeal, and an examination of the record as made on the last trial has confirmed the correctness of that conclusion.

II. To avail themselves of the fraud mentioned as a complete defense, the contract must have been rescinded, and appellant contends that rescission was neither pleaded

2. SAME: rescis-
sion: pleading:
waiver:
appeal.

nor proven. It may be, as said by appellee, that the allegations in the answer were sufficient, but these were withdrawn by the amended and substituted answer, which, though specifically alleging the fraud, omitted any reference to rescission. The trial, however, proceeded on the theory that whether there had been a rescission was in issue. No objection to the evidence bearing thereon because not alleged was interposed, and the plaintiff requested an instruction that, "in order to rescind a contract, the party seeking to do so must return to the other party everything of value which he received under and by virtue of said contract. You are instructed, therefore, that unless you find from the evidence that defendants returned to said Tracy, or offered to return to him, everything of value which they received under and by virtue of said contract, they will be deemed to have accepted the terms of said contract, and be bound thereby, and your verdict must be for the plaintiff." Though there were other representations said to have been fraudulent, none of these were submitted to the jury, but plaintiff requested that the jury be instructed

that, unless the representations with respect to Stover were material and operated as a fraud on defendants, the verdict should be for plaintiff, thereby treating that issue as properly raised when this were not possible under the pleadings in the absence of rescission being alleged. We are satisfied that the defect in the amended and substituted answer was overlooked at the trial which proceeded as though rescission of the contract had been averred therein. In these circumstances the omission can not be urged as a ground of reversal. *McLeod v. Thompson*, 138 Iowa, 304; *Hanson v. Kline*, 136 Iowa, 101; *Marengo Savings Bank v. Kent*, 135 Iowa, 386; *Fenner v. Crips*, 109 Iowa, 455.

III. Nor can it be said that the evidence was insufficient to support a finding that a rescission was effected. Letters written by Maxin to Tracy in 1904 related to

3. EVIDENCE:
conversation
by telephone:
identity of per-
son talked
with.
- a breach of the contract, and not to fraud in procuring it. Maxin, acting for defendants, wrote a letter in April, 1905, saying the purchasers chose to rescind the contract, and that they held the horse as his property. But there was no evidence showing how or to whom the letter was addressed, nor where Tracy then resided. He had previously written Maxin that he had changed his location from Galesburg, Ill., to Martin, Tenn., but about this time Holbert ascertained that he had left there and had gone to southeastern Missouri and was "moving from place to place." Evidently the circumstances were not such as to raise a presumption that this letter was ever received by Tracy. In a prior communication, the date of which does not appear, Maxin had written that the horse was not up to the contract, and inquired what was to be done with him. To this Tracy had responded by offering to furnish another horse, but advising that the stallion be tried another year. This did not purport to be a rescission, and there was none unless effected through defendant.

ants' attorney, Holbert. As to this appellant says: "(1) That the testimony of Holbert was not admissible; (2) that the ground of rescission was not stated; and (3) that it was not made within a reasonable time." It appears that Holbert was employed by the defendants to visit Tracy and arrange a settlement if possible, and for the purpose went to Martin, Tenn., in the forepart of April, 1905. Upon reaching there, he found Tracy's name on the hotel register, but learned that he had gone to a place in south-eastern Missouri, and proceeded there. Again his name appeared on the hotel register, and a horse in a livery was said to be his, but the attorney was informed that he was out in the country some twenty-eight miles distant. Thereupon Tracy was called over the telephone, and Holbert testified that upon inquiry the person at the other end said his name was Wm. T. Tracy, and that he had sold a horse to some parties at Hills (the location of defendants). Holbert then informed him that he represented said parties, and would like to talk about the matter, and inquired whether he would return to town. The answer was that he did not know. The attorney then asked if he could meet him in the country. The response was that he was moving from place to place, and did not know where he would be, and could not fix a time. Holbert then told him that the company had elected to rescind the contract, that the horse would be held from that time on as his property, and asked where the notes were. The answer was that he did not know just where they were. The attorney inquired where he would have the horse sent, and the party at the other end of the line hung up the receiver. This testimony was taken subject to objection as incompetent, immaterial, irrelevant, and the motion to strike on these grounds was subsequently overruled. The objection raised is not that the conversation was over the telephone (*Shawyer v. Chamberlain*, 113 Iowa, 742),

but that the party with whom it occurred was not identified as Tracy.

Ordinarily identity of one speaking through a telephone is by sound of voice. But it may appear by circumstances quite as certainly. From the circumstances that Tracy had been located at Martin, Tenn., had been traced to a particular place in Missouri, had appeared at the telephone in response to a call for a person of that name, admitted that such was his name, and was familiar with the transaction of the defendants, the jury might well have concluded that he was the identical person of whom the stallion had been purchased and who was named as payee in the note. The situation was somewhat analogous to that of a person responding to a letter or telegram addressed to him at his usual place of residence; the presumption being that the individual responding is the person to whom the letter or telegram had been sent. Where a call is transmitted over a telephone for a named person and one of that name responds to the call, it would seem that he may be assumed to be the identical person who has been called. As seen, other circumstances tended to confirm such inference in the case at bar, and the evidence of identity was sufficient to justify submitting to the jury whether the person with whom Holbert conversed was William Tracy, and therefore the testimony of Holbert concerning the conversation was properly admitted.

IV. The ground for rescinding the contract does not appear to have been stated to Tracy by Holbert. But Tracy was advised of the defendants' election to rescind,

* ~~SALE CONTRACT: rescission: waiver.~~ and, in view of his conduct in hanging up the telephone receiver, we are not inclined to hold that a statement of the ground therefor was essential. The knowledge his agents acquired in the transaction was imputed to him, and in cutting off further conversation he may be assumed not to have cared for in-

formation as to the occasion of defendants' action. Had a particular ground been stated, as in *Donley v. Porter*, 119 Iowa, 545; *Hawes v. Swanzy*, 123 Iowa, 51, and like cases, a different question would arise. But, as none was mentioned, the defendants may urge any tenable cause that existed for rescission.

V. The defendants were bound to notify Tracy of their election to rescind within a reasonable time after ascertaining the fraud practiced. What was a reasonable

5. SAME: notice of rescission: reasonable time necessarily depends on circumstances. Stover testified he informed them about two months after the purchase. Maxin fixes the

date four months thereafter, one of the Clines at six or eight months, and the others at some time in the fall of 1904. That there were nine purchasers is entitled to consideration, as several persons can not be expected to act as promptly as one. The fact that Tracy was a non-resident apparently without a permanent place of abode also should be taken into account. That conditions did not change subsequent to the discovery of the fraud should have some influence. Because of these facts, it can not be said as a matter of law that the delay in advising Tracy of their election to rescind was unreasonable. That issue was for the jury.

VI. The admission in evidence of a letter written by an attorney to Tracy and affirmatively appearing not to have been received by him was without prejudice, as

6. EVIDENCE: harmless error. it merely inclosed a tally sheet, and suggested the possibility of the horse not being a sure foal getter. So, too, was the secondary evidence of the pedigree without prejudice, as no issue relating thereto was submitted to the jury. The loss of letters received in evidence was sufficiently proven.

The attorney concerning whose conversations with Cline and Stover testimony was received had been sent by plaintiff to talk with them, and, for this reason, such

testimony was competent. Evidence that the fees collected for the service of the horse were insufficient to meet the expense of handling was received, but, as this had no bearing on the issue submitted, the ruling admitting the same ought not to be denounced as prejudicial.

The instructions as a whole clearly presented the issues to the jury. The seventh paragraph in its entirety correctly stated the law. The jury was plainly told that,

unless the defense was made out, a verdict ^{7. INSTRUCTIONS:} ~~statement of issues.~~ should be returned for plaintiff, and, in view

of this, it was not error in stating what was essential to make out such defense to omit doing so in alternative form. Instruction seven and one-half was in harmony with the opinion on the former appeal.—

Affirmed.

JOSEPH TUFFREE, Appellee, v. JOHN Q. SAINT, Appellant.

Documentary evidence: ADMISSIBILITY. A memorandum, kept by a party in a book for that purpose, showing the terms of a contract and made in the presence of the adverse party, read over to him and acquiesced in by him is admissible in evidence for the purpose of showing the agreement, over the objection that it is not competent because not signed by the adverse party, and not a memorandum used to refresh the memory of the witness.

Brokers: RECOVERY OF COMMISSION: EVIDENCE: INSTRUCTION. A real estate agent seeking to recover commission under an alleged contract providing for the same, on condition that he urge a certain person to purchase the property, need not show that his urging such party was an inducement or the procuring cause of a sale, but he may recover on proof that he urged such person to buy and that he purchased the property.

Same: INSTRUCTION: WHEN NON-PREJUDICIAL. An instruction which requires of the successful party a stronger showing than is necessary for his recovery is not prejudicial to the defeated party.

Same: INSTRUCTIONS. Plaintiff's version of the commission contract in the instant case was that defendant agreed to pay a commis-

sion if plaintiff would see a certain person and urge him to buy the property, and that he saw and urged such person, who purchased the same. The defendant's version of the agreement was that the plaintiff should induce such person to purchase, and under either version of the contract the evidence justified a finding for plaintiff. *Held*, that an instruction requiring plaintiff to show that he had a contract with defendant requiring him to urge such person to purchase the property, and that if he failed to do so he could not recover, was not in conflict with another instruction regarding defendant's claim that plaintiff should induce a sale, so as to justify a reversal of the judgment for plaintiff.

Appeal from Marshall District Court.—Hon. J. M. PARKER, Judge.

THURSDAY, MAY 12, 1910.

ACTION at law to recover a commission for finding a purchaser of defendant's real estate. Trial to a jury, verdict and judgment for plaintiff, and defendant appeals.—*Affirmed*.

J. M. Whitaker, for appellant.

F. L. Meeker and Burnham & Egermayer, for appellee.

DEEMER, C. J.—Plaintiff alleged that defendant agreed to pay him a commission of \$150 if he would see one Hole and urge him to buy defendant's property, that he did see Hole, urged him to buy, and that he did purchase the property from defendant. Defendant admitted that he agreed to pay plaintiff one-half the regular commission for the sale of the real estate provided he (plaintiff) would see Hole and urge and induce him to purchase the property on or before July 1, 1907. He claims, however, that plaintiff did not induce Hole to buy, and that the sale was not made until after July 1st, the time fixed for

the sale. On these issues the case was tried, the testimony being in conflict, resulting in a verdict for plaintiff.

I. Plaintiff was permitted to introduce on the trial of the case a memorandum entered upon his book in which he listed the property left with him for sale, made by his (plaintiff's) daughter at the time when it is claimed the arrangements were made with defendant. This memorandum reads as follows:

1907.	J. Q. Saint	
May 31	412 N. 4th St.	60x196
\$200	8 rooms, closets, bath, etc.	
	22x24 barn, electric light in barn.	
	Wood house and chicken house combined.	
Sold to		
D. E. Hole	All modern (fine basement)	
'07	\$150.00	\$5,400

Defendant interposed the following objection thereto: "The defendant objected to the introduction of this paper, as it did not appear to be a contract signed by John Q. Saint, nor is it a memorandum used to refresh the mind of the witness, and for the further reason that it is incompetent, immaterial, and irrelevant." These objections were overruled, and exception taken.

Plaintiff's daughter testified that she made this entry upon a book kept for that purpose, in defendant's presence, and that after it was made it was read over to defendant, and that he assented thereto. This made the entry competent testimony. It may be that the part of it referring to the sale to Hole should not have been admitted because it must have been entered after it had been read to defendant; but no objection was made on this ground. There was no error in admitting the entry in evidence.

II. The trial court gave the jury the following, among other, instructions:

(4) In order to plaintiff's recovery in this action it is incumbent upon him to establish by a preponderance of the evidence the following material allegations of his petition, to wit: First. That the defendant listed with the plaintiff for sale, or to find a purchaser, the real estate named in the petition. Second. That it was orally agreed between these parties that the plaintiff should see one Hole and urge that said Hole to purchase defendant's property upon such terms and conditions as defendant and said Hole could agree. Third. That the plaintiff did so urge said Hole to purchase defendant's property in issue, and the said Hole did purchase the same accordingly upon the terms and conditions agreed upon by him and the defendant, Saint. Fourth. That the plaintiff was to have and receive for his services in bringing about the sale to said Hole the sum of \$150.

(6) If you find by a preponderance of the evidence that the plaintiff, Tuffree, had an oral contract with the defendant, Saint, substantially as follows, to wit, that the plaintiff would see Hole and urge him to purchase said property upon terms and conditions satisfactory to Saint and Hole, and Hole did so purchase of Saint, then in that case the plaintiff was to have as commission for his services \$150, and you further find that in pursuance to this agreement the plaintiff saw said Hole, urged him to buy the property in issue, and Hole did buy it of said Saint upon the terms agreed upon between Saint and Hole, then the plaintiff would be entitled to recover in this action \$150, with interest at six percent from June 9, 1907.

(7) You are instructed that, although you may find that the plaintiff, Tuffree, had the contract with said Saint that he claims to have had, yet if you further find that plaintiff, Tuffree, did not induce the said D. E. Hole to purchase Saint's property, and that said Hole purchased the same independently of anything that Tuffree did or said and without regard thereof, the plaintiff can not recover in this action.

(8) You are instructed that if you find from the evidence that the sale and transfer of the property in question from Saint to said D. E. Hole was not induced or brought about by the efforts of the plaintiff, Tuffree,

for the reason that Tuffree did not urge Hole to buy, then he can not recover in this action.

(9) The plaintiff's right to recover in this action depends upon the performance on his part of the contract he says he had with the defendant Saint, and his part was to urge the said D. E. Hole to purchase Saint's property upon the terms and conditions to be agreed upon by Saint and the purchaser Hole. If you find from the evidence that the plaintiff Tuffree, had no such contract with Saint, then he can not recover in this action.

(10) If you find by the evidence as claimed by the defendant that, in case the said plaintiff should induce the said Hole to purchase the said premises, the plaintiff should receive but one-half of the regular commission, your verdict should be for the plaintiff for one-half of the regular commission; that is, should you find the plaintiff entitled to recover under the contract as claimed by the defendant, and not under the contract as claimed by the plaintiff.

The complaint made of these instructions is in the indiscriminate use of the words "urge" and "induce." That there is a difference in these terms is clear; but, as plaintiff claimed that his contract provided a commission for urging Hole to purchase the property, he was not required to show that this urging was an inducement or the procuring cause of the sale. Two instructions, Nos. seven and eight, required a showing on the part of plaintiff that his part in the transaction induced the sale to Hole; but this was not prejudicial to defendant, for it required of plaintiff a stronger showing than was necessary.

Instruction nine told the jury that plaintiff was required to show that he had a contract with defendant whereby he (plaintiff) was to urge Hole to purchase the property, and that if he failed to do so he could not recover. Instruction ten refers to defendant's claim as to the nature of the contract, which was that plaintiff should induce the sale. There was, as we think, no such

conflict in the instructions as would justify a reversal. If the contract was as plaintiff claims, he was not required to show that what he did induced the sale. If the contract was as defendant contends, then doubtless it was necessary to show that what plaintiff did was the procuring, or one of the procuring, causes of the sale. The court instructed that, if plaintiff had failed to make out the contract as claimed by him, he could not recover, and, in addition, it was stated that, even if he had made out such a contract, it was necessary to show that what he did induced the sale. In this there was no error prejudicial to defendant. Even if there be a conflict, as the jury was justified, under either theory, in finding for plaintiff, defendant can not complain.

There is no claim that any of the instructions announces an incorrect rule of law as an abstract proposition, nor is there any contention made that the verdict is without support in the testimony.

No prejudicial error appears, and the judgment must be, and it is, *affirmed*.

T. J. SHEA, Appellant, v. EDWIN CUTLER.

J. P. STEELS, Appellant, v. EDWIN CUTLER.

Contracts: GENUINENESS OF SIGNATURE: ALTERATION: EVIDENCE: ACCOUNTING. In this action for an accounting and judgment for a certain percent of the profits of business done by defendant under an alleged written contract, in which plaintiff was to work for defendant and recover such profits as part compensation for his services, the evidence is held insufficient to show that the contract relied upon was executed by defendant; and insufficient to show that certain erasures and interlineations in the copy of the claimed contract held by plaintiff and relied upon by him were made by defendant or with his knowledge and consent.

Same: ORAL EVIDENCE: ADMISSIBILITY. In this action one plaintiff seeks to recover for services performed under a claimed written

substitute for a prior written contract voluntarily abandoned by him, but conceded as binding if it had been carried out. Another plaintiff is attempting to recover on a written contract which by material alterations made by him was rendered invalid, if in fact they were executed so as to be binding. *Held*, that neither plaintiff can rely upon oral conversations preceding and referring to the attempted execution of the written contract, in the absence of a showing of fraud or imposition on the part of the defendant resulting in the failure to execute a binding written agreement.

Appeal from Polk District Court.—Hon. JAMES A. HOWE,
Judge.

THURSDAY, MAY 12, 1910.

THESE are two actions in equity, tried together in the lower court, in each of which plaintiff asked an accounting by defendant as to the business done by him as contractor and jobber of steam, water, and gas fittings, plumbing, sewer work, and pipe covering in Des Moines, in the one case from September 1, 1904, to January 1, 1906, and in the second case from January 2, 1905, to January 1, 1906, and for judgment in each case against the defendant for two percent of the profits of his business during the period specified under an alleged contract, by which plaintiff in each case was to work for defendant during the specified period at a fixed rate of compensation, and receive in addition thereto said two percent on the profits of his business. In the Steele case plaintiff also asked reformation of the written contract. Defendant in each case denied the execution of the contract relied upon, and by stipulation of the parties evidence was introduced on the question whether the contracts sued upon were in fact executed; evidence introduced in either case to be considered in the other so far as applicable. By further stipulation it was agreed that, before evidence as to the accounting was introduced, the trial court should

make a finding in each case whether plaintiff had established such contract as to entitle him to have an accounting of defendant's business. After hearing the evidence the court found that in the Shea case the defendant did not execute the contract relied upon, and in the Steele case that the contract relied upon by plaintiff bearing the defendant's signature had been materially altered without the knowledge or assent of defendant, and was therefore invalid. Thereupon each plaintiff filed an amendment to his petition, in which he alleged an oral contract substantially in the terms embodied in his alleged written contract, which oral contract had not been reduced to writing, and asked the same relief as had been asked on the alleged contract in writing. The defendant in each case answered the amended petition, in substance denying the allegations thereof, and the court entered a decree denying plaintiff in each case any relief, and entered judgment against plaintiff in each case for costs. From these findings and judgments the plaintiff in each case appeals.—
Affirmed.

Read & Read, for appellants.

Blake & Blake, for appellee.

McCCLAIN, J.—The only direct testimony as to the transactions between the parties was that of the defendant and of these plaintiffs, and they are in substantial agreement to the effect that during the fall of 1904 there were conversations between the defendant and both Shea and Steele with reference to their continuing in the employment of defendant in his general business of plumbing and steam and gas fitting during the year 1905, at a fixed rate of compensation, with the additional inducement of some percentage on the profits of the business. Defendant testified that two percent of the profits of the business,

after deducting losses by bad accounts, etc., was to be divided equally between the plaintiffs. On the other hand, plaintiffs substantially agreed in their testimony that each was to have two percent of the profits in the entire business, and that defendant represented that on the amount of business which he had been doing this would amount to at least \$600 for each of them. Each of the witnesses testified as to efforts made towards reducing this arrangement to writing by means of two separate contracts; defendant's account being that in the latter part of December, 1904, at the suggestion of plaintiffs, he wrote out two contracts, one for each of them, with duplicates, signed the four, and delivered one each to Shea and Steele, that Shea signed his contract and returned it to defendant, and that Steele retained his, expressing the desire to consider the matter further. There was introduced in evidence an instrument in defendant's handwriting on one of his letter heads, purporting to be such a contract as that above described, dated January 2, 1905, and signed by both defendant and Shea. But Shea's action is based on another instrument written by himself, purporting to be dated September 1, 1904, signed by himself, and purporting to have the signature of defendant attached thereto, which instrument differs in material respects from the one written by defendant and confessedly signed by both of them. Shea's explanation as to these two instruments is that, some days after he had signed the instrument drawn by defendant, he expressed to defendant his dissatisfaction with its terms, on the ground that they were not in accordance with the previous negotiations, whereupon defendant told him to draw such a contract as he wanted, and defendant would sign it, whereupon Shea wrote out at defendant's desk, on one of his letter heads, the contract on which he sues, and handed it to defendant, who after casually inspecting it affixed his signature thereto and returned it to Shea. As between

Shea and defendant the principal controversy is as to the genuineness of defendant's signature to this alleged second contract, the execution of which defendant unequivocally denies in his testimony.

The trial court had before it not only the first contract between Shea and defendant with defendant's genuine signature thereto, but also the instrument delivered to

1. CONTRACTS: genuineness of signature; alteration: evidence: accounting. Steele with defendant's genuine signature, and a large number of bank checks bearing defendant's signature, conceded to be genuine.

Expert witnesses as to handwriting, after examining the signatures conceded to be genuine, differed in opinion as to whether the alleged signature of defendant to the contract drawn by Shea was genuine. As we read the testimony of these witnesses we are inclined to the conclusion that those for the defendant denying the genuineness of the signature are entitled to greater credence. Those testifying for the plaintiff admit that the signature in question is quite unlike the other signatures of the defendant, and their explanations as to how they reach the conclusion that it is that of the same person who wrote the signatures conceded to be genuine are far from persuasive. But as the instruments have been transmitted to us for examination, we are inclined to give greater weight to the appearance of these signatures than to the testimony of the experts. It is to us perfectly plain that if the signatures of defendant conceded to be genuine represent his ordinary and natural method of signing his name, then the signature in question is not his, unless it was written in an assumed or unnatural manner. Counsel for plaintiffs practically concede that the signature in question does not appear to be that of the same person who wrote the signatures conceded to be genuine, but they attempt to account for the discrepancy by the claim that defendant wrote his name in an unnatural and unusual way, with the purpose of afterward

denying the execution of the contract. As defendant already had a contract signed by Shea, it does not seem reasonable to suppose that, while the occasion for having a valid contract existed, he should have conceived the purpose of pretending to execute a contract which he might afterwards deny. There is nothing in the evidence to support this theory, unless it be a statement of defendant's stenographer as a witness that during the latter part of the year 1905 defendant said to her that plaintiffs might think they had contracts with him, but they would find out that they were mistaken. This testimony is not very persuasive, for the same witness testified that Steele told her in the fall of 1905 that "Cutler did not know that he (Steele) was going to bring a contract and make him hold to it, but he was when the time came."

We reach the conclusion, which was that reached by the trial court, that there is not sufficient evidence to support Shea's claim that the contract in his handwriting was signed by defendant. Some of the circumstances supporting this conclusion are: First, that the instrument written by him is antedated September 1st, and Shea does not pretend that there was any conversation between him and defendant with reference to this very material change, which would give him two percent on the business for practically three months preceding the execution of the contract, which both of them had already signed; and, second, that during his subsequent employment with defendant he constantly received compensation for extra hours' work beyond the \$4 per day stipulated in the contract, although one of the stipulations in the contract which they had both signed was that Shea must render good and faithful services to the best of his ability, and "must be willing to be at store to help check out and in the men, and help take stock account, and in other work pertaining to the store to be done after work hours." Shea testified that he had rendered such services to defendant

before and after the usual hours for work, but claimed that the extra pay he had received was for working after hours and on Sundays out of the shop, and that he received no extra pay for the additional services he was to render under the contract in carrying on the general business. A further discrepancy between the contract which both signed, and the one on which plaintiff relies, is that the former provides for an allowance to Shea of two percent of the gross earnings of the plumbing business of defendant, while the contract written by Shea specifies this additional compensation as two percent of all business done by the defendant. As to this, Shea's testimony was that he understood the term "plumbing business" to include all of defendant's business, although he was in fact only a plumber, and under the rules of the unions, to one of which he belonged, was not allowed to do steam or gas fitting, or other kinds of work within the scope of defendant's business than that of plumbing. Shea did not testify that he objected specifically to defendant that the contract which they had signed was not in accordance with their agreement in any of these particular respects, but only that in some ways not pointed out such contract did not correspond to their agreement. It does not seem reasonable that defendant would have agreed, without discussion or protest, to these material modifications of a contract already fully executed, unless, as already suggested, he had at that time formed a purpose of pretending to affix to the contract written by Shea a signature which he might afterwards deny, and the circumstances lend no color whatever to any such purpose on his part in voluntarily writing his name at once and without objection to a writing materially different from the instrument for which it was proposed as a substitute. There is no other testimony than that of Shea's to the actual affixing of defendant's signature to the contract on which Shea has sued; for, while both Shea and Steele testify to the cir-

cumstances, Steele only says that defendant signed the paper which Shea presented to him without pretending to identify this contract as the one which defendant thus signed. We are satisfied on the whole record that Shea has failed to prove the execution by defendant of the contract on which he sues.

As to the contract relied upon by Steele, it is sufficient to say that it shows several erasures and interlineations which do not appear in the duplicate which defendant retained. The only question is whether these erasures and interlineations were made by the defendant or with his knowledge and consent, and we think on this question Steele has not sustained his burden of proof. We have in the record the testimony of an attorney to whom Steele presented his copy of this contract for the purpose of consulting him as to its meaning and effect, and the witness testified that it did not then show the erasures and interlineations complained of. Steele did not testify that after the contract was delivered to and taken away by him he had any further negotiations with defendant as to the making of changes, nor that after he himself signed this contract it was presented to the defendant and acquiesced in by him as the contract between them. Indeed, Steele does not testify that he ever advised defendant that he had signed the contract after having retained it for consideration. It is true that in one portion of his testimony he said that he signed it after these erasures and interlineations had been made by defendant, but this statement seems to be inconsistent with his other statement as to what took place with reference to the execution of this contract. We reach the conclusion therefore that Steele is not entitled to recover on the contract on which he sues, and this conclusion makes it unnecessary to consider the question whether he is entitled to have the contract reformed so as to show that his two percent should be

computed on the entire business, and not solely on the plumbing business.

There is not enough evidence in the record to justify the granting of relief to either of plaintiffs on an oral contract which through mistake or inadvertence was not reduced to writing. The conversations, as

<sup>a. SAME: oral
evidence: ad-
missibility.</sup> stated by all the witnesses, contemplated written contracts. There was unquestionably

some attempt to execute written contracts. If written contracts binding on the parties were not executed, unless the failure of execution resulted from some fraud or imposition on the part of defendant, plaintiffs can not recover. No such fraud or imposition appears. Shea voluntarily abandoned a written contract which was confessedly binding if it had been carried out, and now attempts to recover on a written substitute for such contract. Steele attempts to recover on a contract which he has rendered invalid by material alterations, if in fact it was ever executed on his part so as to become binding on him. We can see no ground for allowing either of these parties to now rely upon oral conversations preceding and having reference to the attempt to execute written contracts.

If we should concede good faith to plaintiffs, there is nothing in the case to show any imposition practiced upon them. Shea has received payment for all his time, and for much extra time at the rate of \$4 per day, although, as he himself testified, the usual rate of compensation for plumbers was \$3.75 per day. And Steele, who was qualified only as a bookkeeper, has received pay at the same rate which he was previously receiving from defendant for the same kind and amount of work.

On the whole case, we are satisfied that the decree and judgment of the trial court in each was right, and it is *affirmed*.

**JOSEPH TRETTER v. CHICAGO GREAT WESTERN Ry. Co.,
Appellant.**

Injury to growing crops: MEASURE OF DAMAGES. The damage to growing crops where no injury to the land is claimed may be determined by estimating the damage to the crop directly, rather than indirectly by estimating the value of the land with the crops before and after the injury, by determining the value of the crop in the field, or on the market, with proper deductions for the cost of maturing and marketing of the same.

Same: INSTRUCTION: ASSUMPTION OF FACT. In this action the court instructed that recovery was sought for damage to growing crops and not to the land, and that in arriving at the amount of damage the jury should consider the cost of production up to the time of loss, the market value in the field or in the market place, and proximity to the market, and should consider all evidence of damage or loss and the opinion of witnesses as to the value of the crops and cost of production. *Held*, not objectionable as assuming a right of recovery, since there is no occasion for the jury to apply an instruction as to damages unless the other issues are found for the plaintiff, as to which the jury was elsewhere instructed; nor was it objectionable as proceeding on the theory that all the crops were destroyed; nor because unsupported by evidence of the cost of production.

Same: MEASURE OF DAMAGES: INSTRUCTION. In an action to recover for injury to a growing crop the jury should be told whether plaintiff should be allowed the market value of the crop in the field or in the market place, and if in the market place whether deductions should be made for the cost of maturing and placing it upon the market, or whether such expense was to be eliminated. The instruction in this action is held to have been insufficient in these respects.

Drainage of surface water: OBSTRUCTION TO NATURAL FLOW. A rail-way company is bound to use ordinary care in filling a passage way for surface water, usually and naturally flowing under its tracks, so as not to unnecessarily dam up and throw the water back onto an adjoining land owner, thus causing him unnecessary inconvenience and damage.

Growing crops: EVIDENCE OF VALUE. In an action for damage to

5 crops evidence as to the value of the crop should be confined to such a crop as plaintiff had.

It is also held that an exclusion of a price list which gave the same prices for growing plants that plaintiff had testified to was not prejudicial.

Appeal from Marshall District Court.—Hon. J. M. PARKER, Judge.

FRIDAY, MAY 13, 1910.

ACTION for damages resulted in judgment against defendant, from which it appeals.—*Reversed.*

Carr, Carr & Evans and Carney & Carney, for appellant.

Bradford & Johnson, for appellee.

LADD, J.—The two lots belonging to plaintiff and containing about five acres of land are bounded on the southeast by the right of way of the Chicago & Northwestern Railway Company, parallel with which and immediately beyond is the right of way of the Chicago Great Western Railway Company. These lots are lower than the land surrounding them, and the water gathering on them flows through a natural depression from the northwest to the southeast, passing therefrom beneath a bridge sixteen or eighteen feet long in the roadbed of the Chicago & Northwestern Railway Company, and prior to July, 1907, under a similar bridge in the roadbed of the Chicago Great Western Railway Company. About that time a car load of earth was dumped into the way beneath the latter bridge, obstructing the passage of water, to plaintiff's injury. Later on seven or eight gravel cars were emptied at the same place, filling the space beneath the bridge, and this so obstructed the passage of water that upon a

heavy fall of rain in the fore part of August the water was thrown back on plaintiff's land where it stood for several days, destroying about four hundred heads of cabbage, three hundred tomato plants, and about two thirds of thirteen thousand celery plants. The cabbages were mature. The celery appears to have been ready for bleaching, but whether this process is to be regarded as essential to maturity or merely as a preparation for market we are not advised. The tomato vines, though large, had no tomatoes on.

Recovery for the value of these, and not for injury to the land, was demanded. Their value in the field or else on the market with deductions of the reasonable cost of maturing and marketing was the correct measure of damages. *Blunck v. Railway*, 142 Iowa, 146. See, also, *Smith v. Railway*, 38 Iowa, 518, and *McMahon v. Dubuque*, 107 Iowa, 63. In *Drake v. Railway*, 63 Iowa, 302, relied on by appellant, permanent damages to the premises were claimed in connection with the loss of crop, and this accounts for the approval of a different rule in that case. The same is true of *Harvey v. Railway*, 129 Iowa, 465. Where damage to the crop only is claimed, and not to the soil, either because of injury to it in connection with a permanent or perennial growth thereon, there is no good reason for not estimating the damage to such crop directly, rather than indirectly, by estimating the values of land with it before and after the injury. Necessarily such difference is the difference between the values of the growing crops thereon before and after the injury, and the same result is reached. The circumstance that growing crops ordinarily are regarded as part of the realty is not controlling. These may be disposed of apart from the land (*Strawhacker v. Ives*, 114 Iowa, 661), and in measuring damages thereto the value of the land is not involved. The cause was tried on this theory, and the ob-

1. INJURY TO
GROWING
CROPS: mea-
sure of
damages.

jections to the evidence because not presenting the proper measure of damages were rightly overruled.

II. It is contended, however, that, even though the measure of damages be as stated, the instructions did not so inform the jury. In the ninth instruction the court

2. SAME: instruction: assumption of facts: stated that the action was "to recover, not for damages done to his land, but for damage done to his celery, cabbage, and tomatoes." The tenth instruction may be set out: "In arriving at the amount you find the plaintiff entitled to recover, you should take into consideration the labor, care, and attention and expense you find he bestowed upon his celery, cabbage, and tomatoes up to the time of the loss; or, in other words, an element to be considered by you is the cost of production. You may consider the market value of said crop in the field or in the market place upon the streets and how near they were ready for the market in either place, or what further was necessary to be done to make them ready for the market in either place. The main thing is to take into consideration everything in the evidence that will aid you in arriving at a fair and just verdict. To whatever amount you find add interest at the rate of six percent from time of loss." This was all that was said bearing on the measure of damages, save a remark in the eleventh instruction "that, in ascertaining and fixing the amount of plaintiff's damage or loss, consider all the evidence upon that point, and also consider and weigh the opinion of witnesses who have testified as to the value of such crops and the cost of producing them." The criticisms of the instruction quoted are (1) that it assumes that plaintiff will recover; (2) it allows the cost of production, though no evidence thereof was introduced; (3) it allows recovery for market value without requiring deductions for cost of maturing and marketing; and (4) it proceeds on the theory that all the plants were destroyed. Taking these up separately, it is to be said of the first

that there is no occasion for the jury to resort to an instruction on the measure of damages, unless the finding on the other issues is for the plaintiff. Only in that event is such an instruction made use of, and this is quite as manifest to the jury as to the court. Prior instructions had clearly stated that proof of specified allegations by a preponderance of the evidence was essential to plaintiff's recovery, and, in view of this, it is inconceivable that the jury could have inferred from the above that they were to find for plaintiff in any event. Consideration of the instructions as a whole obviates any such inference.

Next, it is said there was no evidence of the cost of production. This is not so. It appeared that plants were started from seed in a hothouse, and then transplanted. The value of plants before being transplanted was proven. One of defendant's witnesses testified to the cost of labor on an acre of celery up to the time of hill-ing and bleaching, and from then on, and it appeared that the plaintiff had about three-fourths of an acre in that crop. From this evidence the cost of production might have been inferred.

The fourth criticism is equally without foundation, but, as to the third, it must be conceded that no definite measure for damages was stated to the jury. Considera-

3. SAME: measure
of damages: market price in the field or in the market
instruction.

tion of the cost of production as well as the place, and cost of labor necessary yet to be done was authorized, but the purpose of so doing was not stated, and no intimation was given as to any rule by which the jury should be guided in determining the amount of damages to be awarded. Was plaintiff to be allowed the market value of the plants in the field or in the market place, and, if the latter, were deductions to be made of the reasonable cost of maturing the crop, preparing for and placing it on the market, or was such cost to be eliminated as plaintiff seems to have done in

testifying for that in any event he would have done the work? On what theory did the jury proceed? The record leaves these inquiries unanswered, and the conclusion necessarily follows that there was error in omitting to instruct the jury the measure of damages to be awarded.

III. Complaint is made of the charge of the court with reference to defendant's liability for obstructing the flow of surface water. The argument, in so far as based

4. DRAINAGE OF
SURFACE
WATER: ob-
struction to
natural flow.

on the assumption that defendant's right of way was taken from plaintiff's land, requires no attention, as there is not the slightest warrant in the record for such assumption. The

instruction proceeded on the theory that defendant in filling the passageway beneath the bridge and where surface water was wont to flow in the usual and natural way, according to the lay of the land, owed plaintiff the duty not to unnecessarily dam up and throw back said water, to the injury of neighboring landowners, but was bound to exercise ordinary care in what it did, so as not to occasion unnecessary inconvenience and damage to such owners. This is in harmony with the golden maxim of the law, that one must so use his own property as not to injure the rights of another, which also is the fundamental principle on which all the decisions of this state relating to surface water are based. In *Livingston v. McDonald*, 21 Iowa, 160, the right of each to do with his own as he pleases was recognized, but with the qualification that each should so use his own as not to injure his neighbor, and it was there said that "he can not make his estate more valuable by an act which unnecessarily renders his neighbor's less valuable." In *Willitts v. Railway*, 88 Iowa, 281, after referring to previous holdings, it was said to be the rule in this state that each proprietor in improving his land must do so in a careful and prudent manner so as to occasion no unnecessary inconvenience or damage to his neighbor, and in *Sullens v. Railway*,

74 Iowa, 659, the rule was declared to be just, and that "the reasons for requiring that improvements on land be so made as to do no unnecessary injury to other lands apply with especial force to the construction of railways." See, also, *Wilson v. Duncan*, 74 Iowa, 491; *Wharton v. Stevens*, 84 Iowa, 107; *Matteson v. Tucker*, 131 Iowa, 511; *Hume v. City of Des Moines*, — Iowa, —. Undoubtedly there are cases to the contrary, but these are from states where the common-law rule prevails, though even in such states decisions are to be found announcing the doctrine above. The evidence without dispute disclosed that surface water after rainfalls usually flowed from the surrounding territory down several streets into that along plaintiff's land, and from there, as so collected on said street, onto plaintiff's land at one place, and then along a depression from the northeast corner to the opening under the bridges of the two railways. That the water after a rainfall gathered in a stream was the only inference to be drawn from the evidence and as such flowed through a depression or swale beneath the bridges, and there is no ground for the suggestion that the water was in a diffused state and not so gathered in a course or stream as to exact the duty of defendant in making the improvement to avoid unnecessary injury to plaintiff's crop.

IV. The ruling by which Ford was not permitted to testify to the value of a field of celery is approved on the ground that the limitation was not to such a crop of

celery as plaintiff had. The price list offered in evidence gave the price of plants the same as testified by plaintiff, so that its exclusion was without prejudice, regardless of whether the proper foundation for its introduction had been laid.

We discover no error in the record save the omission to instruct on the measure of damages.—*Reversed.*

5. GROWING
CROPS: evi-
dence of value.

RUDOLPH WURLITZER COMPANY, Appellee, v. J. L. RHEA,
Appellant.

Sales: RESCISSION: NOTICE: EVIDENCE. The statement by the purchaser of property, upon presentation for payment of the chattel mortgage note given for the purchase price, made to a collector having no authority to represent the payee in any other way, that the purchaser would return the property if the seller would cancel and deliver the note and mortgage and repay the amount paid on the purchase price, was not an objection by the purchaser to the condition of the property binding upon the seller.

Same: RESCISSION: PLEADINGS. A pleading setting out a warranty in the sale of property and breach thereof, and offering to return the property to plaintiff in as good condition as when it was delivered to defendant, for the reason that it is unfit for the purpose for which it was sold, but failing to aver any prior offer to return or to rescind the contract, is insufficient as a plea of rescission for a breach of warranty, although perhaps sufficient as a plea of failure of consideration.

Same: FAILURE OF CONSIDERATION: EVIDENCE. Where the evidence conclusively shows that property purchased was not worthless but did have a substantial value, a plea of failure of consideration is not sustained. Such evidence is only available in support of a claim of rescission or for damages for breach of warranty or misrepresentation.

Same: BREACH OF WARRANTY: DAMAGES: EVIDENCE. Where the purchaser of property warranted to be in first class repair keeps the same for some time after discovering that it is not in good condition, and with the seller's consent selects his own time for sending the same away for repair, and it does not appear that the time consumed in making the repairs is unreasonable, he can not recover for loss of business during the time reasonably consumed in making the repairs, because deprived of the use of the property.

Appeal from Cedar Rapids Superior Court.—Hon. JAMES H. ROTHROCK, Judge.

FRIDAY, MAY 13, 1910.

THIS is an action of foreclosure of a chattel mortgage. The mortgaged property consists of a harp, and the mortgage was given to secure the purchase price thereof. There was an affirmative answer and counterclaim setting up a breach of warranty in the sale of such harp. There was a judgment and decree for the plaintiff for the full amount claimed. Defendant appeals.—*Affirmed.*

Barnes & Chamberlain, for appellant.

U. C. Blake and Redmond & Stewart, for appellee.

EVANS, J.—The original transaction out of which this action has arisen was had in October, 1906. The plaintiff company was a dealer in musical instruments at Cincinnati, Ohio. The defendant was a musician engaged in orchestral work in and about Cedar Rapids, Iowa. The defendant wrote to the plaintiff requesting prices on orchestral harps. In response thereto, the plaintiff sent him a list of "secondhand" orchestral harps, with a quotation of prices on each one. The letter in which such list was inclosed contained the following representation: "These harps are all in first-class repair." In the quotation of prices the particular harp which was afterwards selected by the defendant was quoted at \$800, with a discount of 33 1-3 percent. Replying to this letter, the defendant offered \$500 for this particular harp, to be payable \$100 C. O. D., and the balance in installments of \$25 per month. This offer was accepted by the plaintiff, and the harp was shipped by express and received by the defendant and the notes and chattel mortgage in suit were executed at the time of the delivery. The first three installment notes were paid substantially according to their terms, but no other payment has ever been made. The

action is brought by plaintiff to recover the balance. The defendant's answer is in two counts. In the first count defendant sets up a warranty consisting of the representation above quoted from plaintiff's letter, and alleges a breach of such warranty in that the harp when received was not in first-class repair. It is averred therein that the harp "is worthless and of no account to the defendant," and "defendant hereby offers to return said harp to plaintiff in as good condition as it was when it was delivered to him for the reason that said harp is unfit for the purpose for which it was sold." The second count of the answer consists of a counterclaim. It embraces all the allegations of the first count, "and in addition thereto states that at the time he purchased the said harp from the plaintiff he was engaged in teaching music and conducting an orchestra at Cedar Rapids, Iowa; that at the time he purchased the harp from the plaintiff, and before he ascertained that it was entirely unfit for orchestral use, he entered into various contracts to furnish music at divers times and places; that by the failure of the plaintiff herein to furnish this defendant with a harp in first-class repair, and by reason of their negligence in repairing, and their failure to repair, said harp within a reasonable time, defendant was forced and did abandon his contracts to furnish music, as aforementioned, in all to his damage in the sum of \$250." The prayer of the answer and counterclaim is that the defendant recover \$425, being \$250 damages and \$175 paid on the purchase price.

It appears without dispute that within three days after receiving the harp the defendant wrote to plaintiff, complaining of the "action" of the harp. He also wrote that he had "gone over it thoroughly, and found it a beautiful toned instrument in good repair with the exception of the action." Replying to this complaint, the plaintiff suggested that defendant have the same repaired

if possible at Cedar Rapids, at the expense of plaintiff; otherwise that it be sent to the Chicago office of the plaintiff. Thereupon defendant wrote to plaintiff that he "had it fixed up temporarily, and as soon as my work gives me an opportunity I shall send it to your house at Chicago, as it is far from being satisfactory." The defendant used the harp in his work until about the middle of February. On February 11th, he wrote to the plaintiff that the harp "is getting so badly out of shape that it needs going over by expert repairers." The plaintiff suggested that the harp be sent to one Schimmeyer of Chicago for the purpose of repair. On February 19th, in pursuance of this suggestion, the defendant sent the harp to Schimmeyer. On May 3d, he received it back from Schimmeyer in apparently first-class repair. On May 4th, he wrote to the plaintiff company that "the harp is now in good condition such as it should have been when shipped to me from Cincinnati." In this letter, however, he claimed damages of \$200 as being the amount lost by him during this "period of waiting," and "having no instrument to fill engagements."

The trial court made the following finding of facts:

(1) That at the time the defendant first received the harp in controversy from the plaintiff the same was not in first-class repair.

(2) That when the harp was received by the defendant after the same had been shipped by him to one Schimmeyer to be repaired the same was in first-class repair.

(3) That at the time of the trial the harp was not in first-class repair.

(4) That shortly after the harp was received from Schimmeyer the sharping fingers did not work properly. Some of the strings gave forth a buzzing sound, and the action was not good. That such condition continued to the time of the trial.

(5) That after the harp had been received from Schimmeyer the defendant, upon discovering that the sharping fingers did not work properly, that some of the

strings gave forth a buzzing sound, and that the action was not good, did not notify the plaintiff of those facts, but continued to use the harp without objection to its condition, and so continued to use the same for several months.

A decree was entered for the plaintiff disallowing all claim and counterclaim of the defendant.

I. The defendant makes no complaint of the first four paragraphs of the finding of facts. He claims, however, that the fifth finding of fact is contradictory to undisputed testimony, and he urges upon us

1. SALES: rescis-
sion: notice:
evidence.

such testimony. The testimony so referred

to by the defendant as it appears in the record is that the notes were sent for collection to the Cedar Rapids National Bank, and that they were presented for payment by the cashier of the bank, and that the defendant told the circumstances to the cashier, and said that he would "send the harp back to the Wurlitzer people if they would return the money and cancel the notes and mortgage." This is the only testimony relied on by defendant at this point. It is manifestly inadequate. The cashier of the bank had no authority from the plaintiff to represent it in any way except in the collection of the notes, nor did the cashier assume such authority. On the general merits of the case we would be slow to interfere with the findings of the trial court in the state of the record before us. It appears that the instrument in question was brought into court, and expert witnesses made experiments thereon in the presence of the court as illustrating the testimony. Another instrument also was brought in for the purpose of illustration and comparison. The trial court, therefore, had some advantage over us in the ascertainment of the facts of the case. Nor does the state of the record as presented to us raise any serious question in our minds as to the correctness of the trial court's findings.

II. It is urged by appellant in argument that, even though the fifth finding of fact be sustained, the appellant defendant was nevertheless entitled to recover. It is argued that the court was misled by this finding of fact into an erroneous view of the law, and that he assumed that notice of defect was essential to defendant's right of recovery for breach of warranty. Assuming the correctness of defendant's position at this point as a general proposition, it is insufficient to carry him home.

Turning to the first count of the answer for our first consideration, it is difficult to determine therefrom whether it is intended thereby to plead a rescission of the contract for a breach of warranty, or whether it is intended to plead a mere failure of consideration. This count sets out the warranty and the breach thereof. Its final averment is that "defendant hereby offers to return said harp to plaintiff in as good condition as it was when it was delivered to him, for the reason said harp is unfit for the purpose for which it was sold." There is no averment that the defendant had made such offer prior to the filing of his answer. Nor is there any averment that the defendant did at any time prior to the filing of his answer rescind, or offer to rescind, the contract. We think, therefore, that this count is quite insufficient as a plea of rescission of the contract by reason of the alleged breach of warranty. This count, however, does aver that the harp is worthless and of no account to the defendant. This is perhaps sufficient in view of other allegations as a plea of failure of consideration.

Treating this count as sufficient plea of failure of consideration, we are confronted with the fact that the evidence fails to sustain it. On the contrary, the testimony on the part of defendant shows conclusively that the harp was not worthless, but that it did have substantial value. This

2. SAME: recis-
sion: plea-
dings.

3. SAME: failure
of considera-
tion: evidence.

particular defense can not be sustained by a mere showing that the value was less than the consideration paid. Such a showing is available to the purchaser only in support of a claim of rescission or of a claim for damages based upon a breach of warranty or of false representations. Our conclusion, therefore, is that the first count of defendant's answer does not plead a rescission, and that its plea of failure of consideration is not sustained by the evidence.

III. In the second count of the answer, which is denominated a counterclaim, the defendant claims damages in the sum of \$250, in the words which we have already

4. SAME: breach
of warranty:
damages: evi-
dence. quoted herein. The alleged warranty was that the harp was in "first-class repair."

When the defendant discovered that the harp was not in such repair, he elected to call upon the plaintiff company to put it in such repair, to which the plaintiff company agreed. He also kept and used the harp for over three months before sending the same to Chicago, as proposed by the plaintiff company. He selected his own convenient time, with the consent of the plaintiff, for the purpose of sending back the harp for repair. He did send it to Schimmeyer. His letter to Schimmeyer requested that he take the necessary time "to do a perfect job." His claim for damages is based upon the alleged loss of business by reason of unreasonable delay in repair and returning the harp. Inasmuch as he voluntarily entered into the above arrangement, it is clear that he could not recover for alleged loss of business for the time reasonably consumed in making the repair. He offers no evidence to show what would have been a reasonable time, nor that the time actually consumed was unreasonable. The only testimony on that point is that of the witness Schimmeyer, who testified on behalf of the plaintiff, which tends to show that the time consumed was reasonably necessary; the nature of the work being such as to require it for drying and setting.

On the question of damages, the evidence on behalf of defendant was directed principally to damages measured by the difference between the value of the harp in the condition in which it was and such value as it would have had if it had been in first-class repair. And this is the measure of damages principally urged upon our attention on this appeal. We see no way to grant this relief upon this record. Defendant's counterclaim is so framed as to specify the nature of the damages claimed, as we have already pointed out. There is the further consideration that the second finding of fact by the trial court was that the harp was in first-class repair when the defendant received it from Schimmeyer. This was a fulfillment of the warranty, and left no ground for damages, unless it be for unreasonable delay, as before indicated. Defendant has assumed in his argument here that the condition of the harp as received from Schimmeyer was a mere appearance of good repair, and was not such in fact because of the subsequent condition of the instrument. The finding of fact is against the defendant in that respect. If the harp was in first-class repair when the defendant received it from Schimmeyer, as found by the trial court, the plaintiff company was under no obligation under its warranty to maintain such repair. If the repair by Schimmeyer was a mere appearance or pretense, a different question would be presented. But there is no testimony to that effect, unless it be the mere fact that the harp afterwards became out of repair. How it became out of repair, and what care was exercised by the defendant himself, does not in any manner appear in the testimony.

We think it must be said, therefore, that the defendant has neither maintained his defense of failure of consideration nor his counterclaim for damages, and the decree of the trial court must be *affirmed*.

J. W. BUMMELHART, Appellant, v. WILLIAM BOONE,
EMERSON WALMER and HERBERT WALMER.

Replevin: VENUE: EXECUTION OF WRIT. The venue in a replevin
1 action is properly laid in the county where the property is situated
at the time of filing the petition and issuance of the writ, and where one of the defendants resides, although a codefendant may reside in another county; and the fact that subsequent to issuance of the writ the property or part thereof is removed to another county will not defeat the action, but the officer may follow the property and execute the writ in any county of the State where the property may be found.

Actions: GENERAL APPEARANCE: SERVICE OF NOTICE. General appearance
2 to an action in replevin is effected by the filing of a motion assailing the writ for insufficiency of the petition and attacking plaintiff's claim to possession of the property, rendering service of an original notice unnecessary.

Replevin: PETITION: SUFFICIENCY. A petition in replevin alleging
3 that the property was obtained from plaintiff by conspiracy and fraud, that one of defendants first obtained possession and transferred the property to his codefendant in perpetration of the fraud, also alleging rescission of the oral arrangement under which possession was obtained and demanding return of the property, was in conformity with the statute defining the requisites of a petition in replevin.

Replevin: DISMISSAL OF ACTION. Where the sheriff seized part of
4 the property in the county in which the replevin action was properly brought, and the balance in another county to which it was removed after commencement of the action, the court erred in dismissing the action and quashing the writ, even though the seizure in the latter county might have been illegal.

*Appeal from Linn District Court.—Hon. MILO. P.
SMITH, Judge.*

FRIDAY, MAY 13, 1910.

A PETITION in replevin was filed in Linn County

September 11, 1908, in which plaintiff prayed for the possession for two span of mules. Upon approval of the bond, a writ of replevin was issued and the property seized by the sheriff and delivered to plaintiff's attorney. Five days later one of the defendants, Emerson Walmer, filed a motion to quash the writ, and after service of the original notice on the other, William Boone, he filed a like motion, also asking that the cause be dismissed and Walmer filed an amended and substituted motion. On leave the petition was amended, and, by agreement, the motions were to stand as though subsequently filed. The court then sustained Walmer's motion to quash, and ordered possession of the mules to be restored to him, and also sustained Boone's motion to dismiss and taxed \$55 against plaintiff as Boone's expenses in attending court in the wrong county. The plaintiff appeals.—*Reversed.*

Wade, Dutcher & Davis and Samuel D. Whittig, for appellant.

Randall, Courtney & Harding, for appellees.

LADD, J.—The petition in replevin was filed September 11, 1908, and the writ issued on the same day. At that time, according to the amendment to the petition, and for ten or twelve hours thereafter, the two span of mules in controversy were in Linn County, and the defendant Emerson Walmer was a resident thereof. The venue then was rightly laid, even though defendant Boone was a resident of Johnson County, for section 4163 of the Code provides that such an action may be brought "in any county in which the property or some part thereof is situated."

And this conclusion is not obviated by the circumstance that one team of mules had been taken a few rods across the line between Linn and Cedar Counties after

the writ had been placed in the hands of the sheriff, though prior to its service. Section 4169 of the Code provides that: "When any of the property is removed to another county after the commencement of the action, the officer to whom the writ is issued may follow the same and execute the writ in any county of the state where the property is found. For the purpose of following the property, duplicate writs may be issued, if necessary, and served as the original." The expression, "commencement of the action," is not here employed in a technical sense, but has reference to the issuance of the writ of replevin, as plainly appears from the section following, which authorizes the officer to follow the property and take it from any person receiving it from the defendant subsequent to the issuance of the writ.

Four days subsequent to the filing of the petition, Walmer filed a motion to quash the writ. In so doing he assailed the writ because of the alleged insufficiency of the petition. The sole issue was the right of possession, and the motion directly assailed the plaintiff's claim thereto. Manifestly, then, the appearance was for a "purpose connected with the cause," and rendered the service of an original notice on Walmer unnecessary. Section 3541, Code.

That petition, as amended, contained all the requirements of section 4163 of the Code, and alleged, in substance, that the property was obtained from plaintiff through conspiracy and fraud practiced on him by the three defendants; Boone first obtaining possession of the property and afterwards transferring the same to the Walmers in the perpetration of their fraudulent enterprise. It also alleged a rescission of the oral arrangement under which possession was obtained and a demand on Emerson Walmer and William Boone for the property. The rescission was because of the fraud alleged to have been practiced as well as of the defendant's inability to

perform, and not owing to the last alone, as assumed by counsel for appellee in argument. If possession was obtained by Boone as alleged and transferred to Walmer in the execution of a scheme to defraud, it is not perceived on what theory the action was dismissed as to the former and the writ quashed as to the latter. Even if it were to be conceded that the sheriff illegally seized the team in Cedar County, there could be no question as to his authority under the writ to take that in Linn County. In any event, the latter was in issue, and the ruling must have been based on the thought that moving to quash did not constitute an appearance to the merits in virtue of section 3541 of the Code.

As our conclusion is otherwise, the ruling on both motions are reversed, and the cause remanded for further proceedings not inconsistent with this opinion.—*Reversed.*

J. J. OWEN v. NATIONAL HATCHET COMPANY, Appellant.

Judgments: WHEN APPEALABLE. While there must be an entry of judgment before an appeal can be taken, and a mere memorandum upon the judge's calendar or the filing of a written form of entry not in fact spread upon the record is not a judgment or decree; still, an entry by the court upon the journal dated and signed by the judge, showing the commencement and conclusion of argument, decree granted for plaintiff as prayed, judgment against defendant for cost and that defendant excepts, is an appealable judgment, although the formal judgment or decree was not entered until after the appeal was taken.

Contracts: CANCELLATION: FRAUD: EVIDENCE. In this action to re-scind a contract and cancel notes given for an exclusive agency to sell a patent device, the evidence is reviewed and held insufficient to show that the execution of the same was induced by fraud or misrepresentation.

Bills and notes: CONSIDERATION. A failure to properly execute a collateral agreement as a consideration for which notes are given does not necessarily render the notes, when properly executed and delivered, void for want of consideration.

Contracts: UNILATERAL AGREEMENTS. Where a contract is made in 4 duplicate failure of one of the parties to sign both papers does not render the agreement unilateral.

Contracts: REVOCATION. Where one party to a contract made with 5 an agent of the other fails to repudiate the agreement until after notice of revocation by the principal, he can not then withdraw from the same except on grounds entitling him to a rescission.

Same: RESCISSION: FRAUD: EVIDENCE. In this action to cancel a 6 contract for an agency to sell a patented article in a specified territory, the evidence of fraudulent representations as to patents covering the article, or of failure of consideration, is held insufficient to justify rescission.

Expert evidence: PROOF OF PATENT LAWS. The patent laws of the 7 United States are not the laws of a foreign country and are not therefore subject to proof by expert evidence.

Patents: PRESUMPTION AS TO VALIDITY. There is a presumption in 8 favor of the regularity, and validity of a patent issued by the government.

Same: RESCISSION. The fact that the purchaser of the right to sell 9 a patented article in a specified territory paid too much therefor is not ground for rescission of the contract, in the absence of fraud.

*Appeal from Marshall District Court.—Hon. C. B.
BRADSHAW, Judge.*

FRIDAY, JULY 2, 1909.

SUPPLEMENTAL OPINION, SATURDAY, MAY 14, 1910.

ACTION in equity for the cancellation of certain promissory notes and rescission of contract. Decree for plaintiff, and defendant appeals.—*Reversed.*

Boardman & Lawrence, for appellant.

Jesse Gouge and J. M. Whitaker, for appellee.

WEAVER, J.—The plaintiff alleges that on May 5, 1906, one Smith, an officer and agent of the defendant, induced him to execute and deliver to the defendant seven promissory notes for \$100 each without any consideration therefor. The substance of the claim, as stated, is that defendant, through its agent, represented that it had a valuable patent right for the manufacture and sale of a combined "hatchet, hammer, wire cutter, wire splicer, pinchers, leather punch, staple and nail puller, screw-driver, hoof trimmer, and pruning knife," and that the same was protected by valid letters patent, and was a valuable and marketable device; that plaintiff, believing and relying upon said representations, executed and delivered the notes in consideration of the promised transfer to him of the exclusive right to sell said device in certain named counties of the state of Iowa; that said representations were untrue, and were known by the agent acting for the defendant to be untrue; and that the rights and interests pretended to be transferred in consideration for the notes were of no value whatever. He claims, also, that a written or printed contract signed by him at the same time for the purchase of said rights was never, in fact, consummated, and that, upon learning the truth of the situation, he at once repudiated the agreement, and demanded the return of the notes, for the cancellation of which he asks a decree. Defendant admits the making and delivery of the notes, but denies all other allegations of the petition. This issue being tried to the court, a decree was entered for the plaintiff, and defendant appeals; notice thereof being served April 15, 1907.

I. On November 1, 1908, while the foregoing appeal was still pending in this court, the appellee, claiming that the decree appealed from had not in fact been entered by the clerk at the date of the service of the notice of appeal, made application to the trial court to correct the record to show

1. *JUDGMENTS:*
when appeal-
able.

that fact. On a hearing of this application, the court found that the decree was not spread upon the record until some time during the month of May, 1907, and directed the clerk to "note on the record of said decree the exact date of such record, and, if he can not do so, note thereon that by the ruling of the court it has been adjudged that such decree was not spread upon the record until some time after April 15, 1907." From this order defendant has also appealed. The appellee in reliance upon the same order has moved this court to dismiss the appeal because it now appears that the notice was prematurely served. Concerning this branch of the controversy, we will say that the following facts are shown without substantial dispute: The cause having been submitted for decision, the trial court announced its finding in favor of plaintiff on April 12, 1907, and at the same time made an entry in its calendar as follows: "Arguments commenced and concluded. Decree for plaintiff as prayed. Judgment against defendant for costs. Defendant excepts." On the same day the clerk made in the journal of his office under the title of this case the following entry: "Now, to wit, April, 12, 1907, the arguments of counsel are commenced and concluded. Decree is granted for plaintiff as prayed and judgment is rendered against defendant for costs. Defendant excepts." This record was duly signed by the judge presiding at the term. On the same day the clerk entered in a book of his office known as the "combination, appearance and judgment docket," a memorandum of the judgment against the defendant for costs. A formal decree was prepared by the counsel and signed by the judge under date of April 12th, and filed with the clerk on the following day, April 13, 1907. On the question whether the formal decree was actually spread upon the record prior to April 15, 1907, there is some uncertainty in the record. One of plaintiff's counsel testifies that he examined the record

twice within thirty days after the notice of appeal was served, and on neither occasion had the record been made. The clerk, who himself copied the decree into the record, testified that it was the invariable rule of his office to make the brief entries first above referred to on the same day on which the memorandum order of the court for a judgment or decree was entered in the calendar, but, owing to the pressure of work, the actual copying of the formal or extended decree was not always done at once, but it was attended to as quickly as possible under the circumstances. He is not able to state the exact date when the entry was extended, or whether it was done before the close of the day of April 15, 1907. His deputy's testimony is to the same effect. Giving to this testimony the construction most favorable to plaintiff, it still shows the existence of an appealable judgment or decree on April 15, 1907. Let us suppose that no formal decree had ever been presented to or signed by the judge and ever spread upon the clerk's books, and that the appeal had been taken as it was taken on April 15, 1907, would a motion in this court to dismiss the appeal for want of sufficient showing of an appealable judgment be well taken? Again, let us suppose that no other record of the trial court's decision had ever been made than is contained in the record of April 12, 1907, "Trial concluded; decree granted for plaintiff as prayed; judgment entered against defendant for costs," and, no appeal being taken therefrom, defendant had thereafter brought suit against plaintiff upon the promissory notes in controversy—could it be successfully contended on its part that the judgment so entered, brief and informal as it may be, was not a complete and final adjudication against its right to maintain such action? In our opinion both these inquiries must be answered in the negative. While the entry does not set out in detail the relief granted, it does declare plaintiff entitled to the relief prayed for, and this may be ascer-

tained by reference to the pleadings. If, upon the trial of divorce proceedings in which the plaintiff asks for an absolute dissolution of the marriage contract, the court takes a submission of the case upon its merits and makes the simple entry, "Decree is granted as prayed; judgment against defendant for costs," and plaintiff upon the strength of this record marries another than the defendant, would he be liable to a charge of bigamy? Or, upon his death, would the defendant be entitled to demand dower in his estate simply because an extended formal decree had never been written into the record? The mere statement of the proposition is its sufficient refutation. The rights of parties litigant are not to be sacrificed by such technical niceties. True, we have often held in cases on which appellee here relies that a judgment must be entered before it is appealable, and that a mere memorandum upon the judge's calendar or the filing of a written form of entry not in fact spread of record is not a judgment or decree, but in none of these cases has it been held that entry such as is here presented actually entered of record is not an appealable adjudication. See *Kuhlman v. Wieben*, 129 Iowa, 188; *Cameron v. Railroad Co.*, 8 N. D. 124 (77 N. W. 1016). The appellee's motion to dismiss the appeal is therefore denied, and the order of the trial court correcting the record is reversed.

II. Coming now to the appeal in the main case, it appears that plaintiff is sixty-one years of age, and is a farmer whose activities have not been confined exclusively to farm work. He can read and write, has executed written contracts and leases, kept a checking account at the bank, and has bought and sold live stock. Prior to the transaction in controversy, he purchased the right to sell a patent wagon jack in seven Iowa counties, and was engaged in promoting that venture. From some source he heard that defendant was manufacturing or about to begin the

2. CONTRACTS:
cancellation:
fraud:
evidence.

write, has executed written contracts and leases, kept a checking account at the bank,

manufacture of the combination tool above mentioned, and, thinking that he could profitably handle the same in connection with the wagon jack, wrote to the defendant at Marshalltown concerning it. This correspondence was opened early in the year 1905. Later he went to Marshalltown, visited the factory, examined the device, and had some further talk concerning the purchase of the rights thereto in the same counties for which he held the right to the wagon jack. He was told that the company was not yet ready to sell the hatchet or territory under the patent. None of the tools had yet been finished except perhaps a few samples, though some of the parts had been made, and were shown the plaintiff in the rough. He was told, also, that defendant contemplated making a somewhat different pattern of the same device, which is spoken of as a "solid-jaw hatchet." In May, 1906, Smith, defendant's agent, went to Waterloo, where he met plaintiff, and the negotiations were renewed. According to the plaintiff's version of the interview, Smith impressed upon him the merits and value of the combination tool, and pictured in glowing terms the profits to be made out of its sale and the sale of territory under the patent. Plaintiff hesitated somewhat, but in the end, being compelled to meet another appointment, the parties went to Smith's room, where the notes and contract were hurriedly executed and delivered, Smith agreeing to have a duplicate contract prepared and executed by the company and forwarded to plaintiff by mail. So far as shown by the record, there was no stratagem or trick made use of by Smith to mislead the plaintiff or prevent his reading and knowing the terms of the contract, unless it be found in the hypnotic eloquence which bubbles with seductive spontaneity from the lips of all patent right canvassers and book agents. We have studied plaintiff's own testimony with considerable care, and fail to find any suggestion of a false representation on the part of Smith,

unless it be claimed that his assertion that the device was "all covered up with patents" was untrue. He does say that Smith told him that the company had sold five thousand to seven thousand of the solid-jaw hatchets and about one thousand five hundred of the other variety, but as he concedes he had but a short time before visited the factory, and there learned that the tools were not ready for the market, we think he could have been in no manner deceived by the statement, if it was in fact made. Shortly after the meeting in Waterloo and the delivery of the notes to Smith, the defendant signed and executed a duplicate of the contract, and mailed it to the plaintiff. By this time the enthusiasm of the latter had naturally cooled, and, upon reading the instrument, he discovered, as he says, that "it was all one-sided," and then for the first time consulted his attorney. Thereupon either in person or by attorney he wrote defendant repudiating any obligation under the contract, or, to use his expression, "refusing to accept it" and demanding a surrender of his notes. The demand was refused, and this action was instituted December 26, 1906.

By the terms of the contract the plaintiff, in consideration of the sum of \$700, is given an exclusive agency to sell the National Combination device for a term of three years in seven named counties, subject to a condition by which, in case he fails for a period of six months to apply himself to the business of selling said device or appointing subagents for that purpose, the contract may be forfeited. It was further agreed that, as soon as the company should have manufactured and have ready for introduction the solid-jaw hatchet, the plaintiff should be entitled to an agency therefor during the remainder of the term without further charge. It will be observed that this contract does not profess to sell territory under the patent, but to give the plaintiff an exclusive agency for the sale of a described tool which the writing says is

manufactured under patents No. 607,448 and No. 784,950, and that his authority in the premises consisted in the right to sell the tool and appoint subagents for such sales within certain counties. To sustain the decree below the appellee relies upon the following propositions:

First. It is said that the written contract was never properly executed, and is of no force or validity. This

^{3. BILLS AND NOTES: consideration.} might be conceded, and yet it would not necessarily follow that the promissory notes which were executed and delivered in due form are without consideration. But the objection is not well founded.

It appears that in drawing the contract Smith used a printed form, at the bottom of which were printed the words: "The National Hatchet Company, By _____,

^{4. CONTRACTS: unilateral agreements.} Gen. Soliciting Agent. _____, Party of the Second Part." The blank in the body for the name of the agent appointed was

also left unfilled. In subscribing this paper, plaintiff appears to have written his name in the first-mentioned blank. On the following day the instrument was ratified by the defendant by attaching thereto the following words: "Approved May 16, 1906. The National Hatchet Company by E. E. Valentine, President. By G. A. Smith, Secretary." And a duplicate form was made, signed by the company, and forwarded to the plaintiff. We see nothing in these irregularities to affect the sufficiency of the contract. The two instruments, taken together, leave no doubt as to the meaning and intent of the parties. Plaintiff does not deny that he signed the instrument as the second party to the agreement, and all the essential matters of agreement are clearly and fully expressed. The failure of both parties to sign both papers makes it none the less their mutual contract. It is not a unilateral contract, and it requires no reformation to be made intelligible or to conform it to the intention of the parties, nor does

plaintiff make any claim to the contrary in his testimony.
2 Page on Contracts, sections 571, 572.

Had plaintiff recanted and notified defendant of his withdrawal from the deal before the contract had been ratified, there would be fair room for the contention that
5. CONTRACTS: no agreement had ever been perfected, but revocation. he waited until he was notified of the ratification, and it was clearly too late to declare the deal off unless there be ground on which he is entitled to rescind.

Second. It is said that there was such fraud on defendant's part and such failure of consideration as will justify a rescission by the plaintiff. Though the allegations of fraud made in the petition are ex-

6. SAME: rescis-
sion: fraud:
evidence. tremely broad, yet practically the sole ground relied upon in argument is the fact, as claimed, that Smith told the plaintiff that the combined tool was "all covered up with patents," when, in truth, the only thing covered by the defendant's patents was the device by which the various parts entering into the combination were attached to the arms by which they were operated. It is impossible to believe that plaintiff supposed that the patent could cover all the separate tools entering into the combination. Hatchets, hammers, screw-drivers, and other similar appliances have been in common use in all civilized lands since the day of Tubal Cain, and the novelty, if any, in the device in question, was in the manner and means by which they were supposed to be combined into a single tool. Had the agent convinced the plaintiff that this most versatile and convenient instrument could be utilized for milking his cows, churning his butter, or playing his piano, he would certainly have understood that the patent, if any, covered the operating device by which these results were obtained, and not that any patent was claimed upon the cow, the churn, or the piano.

The claim that the patent covered nothing of any

material value, and that the combined tool is not, in fact, patentable, is supported principally by the testimony of the witness Kennedy, who is a patent lawyer, and has had experience in practice before the Patent Office. He was permitted to testify over proper objections as to the "rule of the Patent Office under the law relative to the breadth and scope of a patent and what it is governed by," and that "the effect of describing an invention in specifications and omitting to make a claim covering any part of the specifications" would be "that such matter would be abandoned to the public—become public property." He was allowed to state what the patents in the present instance cover, and what they do not cover, and that certain features of the combined tool are not covered by said patents, and that still others are not patentable. We are well satisfied that this testimony or the greater part thereof is wholly incompetent. The patent laws of the United States may not be familiar to the state courts and to lawyers not practicing before the department at Washington, but they are not the laws of a foreign country to be proved by the testimony of experts. The sources from which experts learn the law are open to the court, and it is its duty to hear all the testimony, and determine for itself the law applicable thereto, as well as the breadth and scope of the patent.

Assuming for the sake of the argument the correctness of appellee's position that it is within the province of the state courts to determine the patentable or non-patentable character of the device in question, there is at least a presumption in favor of the regularity and validity of a patent granted and issued by the proper department of the government, and we find no competent evidence in the record to rebut that presumption. Nor do we find anything fairly tending to show that the patent held by the

8. PATENTS:
presumption
as to validity.

defendant is not of sufficient breadth and scope to protect every feature of the combined tool which plaintiff had any reason to believe or suppose was protected by it. He admits that, before he purchased, he knew that a tool of somewhat similar kind had been placed on the market by a third party, but says that Smith told him that defendant's patent was superior or first in right, and that the interference would be stopped. Accepting this statement as true, he bought relying upon defendant's promise to take action for his protection in the future, and this can not be relied upon as any excuse or justification for repudiating his purchase without waiting or giving the defendant any opportunity to perform such promise. In considering this phase, it is not to be overlooked that defendant did not sell, and plaintiff did not purchase, a patent or a patent right. The subject of the agreement was an agency to sell the goods manufactured by defendant within a specified territory, such sales to be made by the plaintiff or by subagents of his appointment.

We think it unprofitable to pursue this discussion further. It may be entirely true that plaintiff permitted his hopes of large profits to be unduly excited by defendant's agent, but there is an entire lack of testimony as to any material misrepresentation by him. It may also be true that there is little intrinsic value in the tool for which he took the agency, but he knew precisely what he was buying, and if he purchased at too great a price, this, in the absence of fraud or deception, affords no ground for rescission. But it is to be said that there is an utter failure of proof that the right purchased is without substantial value. Plaintiff has made no effort whatever to use or exercise the right purchased by him. With his notes and contract outstanding he has refused to demonstrate by practical effort the alleged worthlessness of the consideration received for them. He may not be endowed with the peculiar qualities which fit a man to shine in

the line of business he sought to enter, but he is not the first man, and doubtless will not be the last, who has bought the knowledge of his lack in that respect at a high price. As wise a man as Benjamin Franklin once paid an extravagant price for a whistle. Plaintiff was not pursued or run down by the defendant and its agents. He sought them out. He had the matter in mind for a year before the contract was made. He has got all his contract calls for, and, while the speculation may be a losing one to him, we think it is not within the province of the court of equity to relieve him from the performance of the agreement into which he so deliberately entered.

Third. It is finally said that the contract is unconscionable. It does not so appear upon its face, and nothing is shown to demonstrate that such is its practical effect.

^{9. SAME: rescis-} As we have before remarked, plaintiff has ^{sion.} made no effort to test the value of his bargain, and a contract of purchase is not shown to be unconscionable simply by proof that the buyer has agreed to pay more than a thing is worth.

We are of the opinion that the decree rendered by the district court is not sustained by the evidence, and it is therefore reversed and plaintiff's bill ordered dismissed.—*Reversed.*

SUPPLEMENTAL OPINION.

Boardman & Lawrence, for appellant.

Jesse Gouge, J. M. Whitaker, and Mears & Lovejoy, for appellee.

PER CURIAM.—An opinion was filed in this case July 2, 1909, that is reported in 121 N. W. 1076. A rehearing was granted, and the case has been reargued and resubmitted. We have again carefully considered the points

presented by both parties, and we reach the conclusion that the former opinion is right in all respects, and that it should be adhered to. It is therefore readopted and made the opinion upon this rehearing.—*Reversed.*

EVANS, J., dissents.

BENJAMIN DOUGLASS, JR., Appellant, v. E. H. and F. C.
LOUGEES ET AL., Appellees.

Principal and agent: DUTY OF AGENT WHEN PURCHASING PRINCIPAL'S PROPERTY ON HIS OWN ACCOUNT: FRAUD: EVIDENCE. Where an agent having authority to sell the property of his principal proposes to become the purchaser on his own account, he must not only do so with his principal's consent, but he must in the strictest of good faith impart to his principal all the information which he has concerning the property and its value. Where, however, the agency was merely to lease and collect rents and such agent enters into independent negotiations with his principal to purchase the property, no suspicion of fraud arises from that fact alone, and he is under no obligation to assist the principal in obtaining the highest possible price, but the parties are then dealing at arm's length and it is the right of the agent to obtain the property for the least sum possible, without aiding the principal with reference to the sale.

In the instant case defendants' agency was to care for and lease the property in question, never having had any authority to sell; and upon a review of the evidence it is held that no fraud or concealment was practiced by the agents by which their principal was induced to sell the property to them for less than its value; and they are not therefore required to account for profits made on a resale of the property.

Estates of decedents: LEGACIES: SATISFACTION. In this action the owner of land in both this and a foreign State conveyed the property in this State to plaintiff and other heirs, subject to the payment, on the grantor's death, of a legacy to his widow. Subsequently the grantor conveyed the land in the foreign State to plaintiff in trust, subject to a life estate to the grantor. Held, that upon the grantor's death there was nothing left in the property in the foreign State for his estate, and that no part of the proceeds arising therefrom should be applied to the legacy of the widow in satisfaction of the charge against the property in this State.

Appeal from Pottawattamie District Court.—Hon. O. D. WHEELER, Judge.

SATURDAY, DECEMBER 18, 1909.

REHEARING DENIED, SATURDAY, MAY 14, 1910.

SUIT in equity for an accounting from defendants, who, it is claimed, were plaintiff's agents for the handling of certain lands. The trial court dismissed the petition, and plaintiff appeals.—*Affirmed.*

Flickinger Bros., and Louis F. Doyle, for appellant.

Mayne & Hazelton, for appellees.

DEEMER, J.—Benjamin Douglass, Sr., at one time owned something like three thousand one hundred and fifty acres of land in Pottawattamie, Shelby, Mills, and Harrison Counties in this state. These lands were secured by him at a very early date, and for a small price. In September of the year 1897 he conveyed these lands to his seven children, five of whom are represented by this plaintiff; (reserving to himself a life estate therein), and charging the property with two trusts or donations;—one of \$20,000 less the assets of his estate upon his death, for the benefit of his wife, Louise Douglass, and the other of \$10,000 to secure a trust fund of which he was a trustee.

Defendants were for many years the agents of the senior Douglass for the renting of all of these lands, except those in Shelby County, and they looked after the same for him down until the time of his death, which occurred May 4, 1900. Administration was had upon the estate of the deceased in the state of California, where he resided at the time of his death, and something like

\$8,390 was realized from his personal estate, which was applied upon the \$20,000 which was to go to his wife, who survived him. Defendant E. H. Lougee was appointed special administrator of the decedent's estate in this state, and this estate was duly administered upon and closed here. During the lifetime of the senior Douglass the lands were not for sale; but upon his death defendants not only sought a continuance of their agency for the renting and handling of the lands, but also endeavored to secure an agency for the sale thereof. They were successful in securing an agency for collecting the rents of all the lands, except those in Shelby County, but never procured an agency for the sale thereof. They did, however, purchase the interest of five of the seven heirs of the senior Douglass as follows: From Mary McE. Fay, August 24, 1900, for the sum of \$13,000; from William A. Douglass, September 7, 1900, for the sum of \$12,000; from Robert D. Douglass, September 8, 1900, for the sum of \$12,000; from George Douglass, September 14, 1900, for the sum of \$12,500; from Benjamin Douglass, Jr., September 14, 1900, for the sum of \$12,000. Negotiations for these several interests, save that of Mrs. Fay, were concluded in New York City, August 31, 1900. The share of another heir, to wit, Charles H. Douglass, was acquired by one J. J. Raver, who, in May, 1900, began an action of partition against all the other owners. The other share, or the one belonging to Frank M. Douglass, was acquired by one J. P. Hess, as trustee for Day & Hess, about September 10, 1900, for the sum of \$14,000. After the commencement of the partition suit hitherto mentioned, Hess acquired the interest of Raver, and he was thereafter substituted as plaintiff in the action, and defendants, who had acquired the interests of five of the heirs, were substituted as defendants. Other persons representing lienholders intervened in the action, and the case went to decree October 10, 1900, confirming

the shares of each of the parties, ordering a sale of the lands at prices fixed in a schedule agreed upon by the parties, and F. J. Day and E. H. Lougee were appointed referees to sell the land. The lands were all sold by these referees for the aggregate sum of \$147,404.30; the first tract being sold on September 11, 1900, and the last on April 11, 1902. On January 10, 1901, lands to the amount of \$54,100 had been sold, although these sales were not all for cash, and the final report of the referees was not made until December 17, 1903, at which time a final accounting was had and the entire matter closed up. There was realized from the personal estate of the decedent \$8,389.87, and this was applied upon the legacy of \$20,000 to the wife, Louise Douglass; the balance of \$11,375.74 being paid to her by the referees. They also took care of the \$10,000 trust fund created by the deed of the senior Douglass. In addition to being agents for the senior Douglass with reference to the handling of the lands, as hitherto stated, defendants looked after certain litigation which he had in the courts of Pottawattamie County, and their relations and dealings with him are in no manner complained of.

Plaintiff, who represents himself and four other heirs of the senior Douglass, brought this action to compel the defendants to account for five-sevenths of the proceeds of all the lands, upon the theory that they were agents for him and the parties whom he represents, and as such should account to him for all profits made by them on the deal. It is contended that they did not act in good faith, but, on the contrary, falsely and fraudulently misrepresented the value of the lands which they purchased, and covinously withheld certain information, which they possessed as agents, which they should have imparted to plaintiff and his assignors, their principals. It is claimed that defendants represented the lands to be worth from \$25 to \$30 per acre, whereas in truth and in fact they

were worth from \$30 to \$55 and that defendants had offers upon parcels of the land, which they concealed from the plaintiff and his assignors. He asked judgment for the sum of \$35,000. The defendants' answer was in substance a general denial, and by cross-petition they asked judgment for the sum of \$7,570 against the plaintiff, due to the fact that he fraudulently converted to his own use that amount of property, for which defendants should have had credit on the legacy to Mrs. Douglass, the widow. This property consisted of some real estate in the city of Santa Barbara, Cal., which is claimed belonged to the senior Douglass, the proceeds or value of which should have been credited upon the legacy to Mrs. Douglass, but which was in fact received by plaintiff and the other heirs and converted to their own use. The trial court denied plaintiff the relief asked, and also dismissed the cross-petition. Both parties appeal; but, as plaintiff first perfected his appeal, he will be called "appellant."

There is not much dispute in the testimony, save as to the value of the lands at the time defendants purchased their interests; and the law is very well settled.

Save as to the Shelby County land, defendants were at one time agents for the handling and renting thereof, but they never were agents for the sale thereof. They tried to secure the agency, but in this they failed.

1. **PRINCIPAL AND AGENT:** duty of agent when purchasing principal's property on his own account: fraud: evidence.

The general rule of law as to purchases by agents who have authority to sell is thus stated in *Green v. Peeso*, 92 Iowa, 261:

While it is true that an agent for the sale of property may, with his principal's consent, purchase the subject-matter of the agency, where the facts are fully disclosed, and the agent acts in good faith, taking no advantage of his situation, yet a court of equity, on grounds of public policy, will, nevertheless, subject the sale to the severest scrutiny. Its purpose will be to see that the

agent, by reason of the confidence reposed in him, secures no advantage from the contract.' 'When the transaction is seasonably challenged, a presumption of invalidity arises, and the agent then assumes the burden of making it affirmatively appear that he dealt fairly, and in the strictest of faith imparted to his principal all the information concerning the property possessed by him. The confidential relation and the transaction having been shown, the *onus* is upon the agent to show that the bargain was fair and equitable, that he gave all the advice in his knowledge pertaining to the subject of the sale and the value of the property, and that there was no suppression or concealment which might have influenced the conduct of the principal.'

Again in *Ingle v. Hartman*, 37 Iowa, 274, it is said: "And when he proposed himself to become the purchaser, and thus to place himself in a position in which his judgment might be biased by his interest, it became incumbent upon him to furnish exact and truthful information as to everything affecting the value of the land." There can be no reasonable doubt as to this rule where the agency is one to sell. If, however, the agency is not to sell, but to handle the property in some other manner, as to lease it or collect the rents, and the agent enters into independent negotiations with his principal for the purchase of the land, we see no reason for attaching any suspicion to the transaction from that fact alone. In such circumstances he is under no obligation to assist the principal in obtaining the highest price he can. On the contrary, from the moment he attempts to buy, the parties are at arm's length, and it is the buyer's right to obtain the property for the least sum he can, without aiding the seller, to whom, with reference to such sale, he is under no obligations whatever. See *Callar v. Ford*, 45 Iowa, 331.

The nature of the agency should be considered in arriving at the duties which either of the parties owes to the other. If the agency be to sell, then the strict

rule first quoted applies. If the agency be to lease and collect rents, and not to sell, and the agent enters into negotiations to purchase, and makes no false or fraudulent representations or concealments, then his purchase is as good as if he had bought from a perfect stranger. This is pointed out in the cases cited, and in *Smith v. Dell*, 30 Iowa, 594. In so far as shown, defendants were under no obligation to inform plaintiff as to the value of the lands, or to communicate any offers which might be made therefor, except as such information might bear upon the rental value or the amount of income from the lands. Their agency for the deceased terminated with his death, and they were never agents to sell, or even to lease, after the death of the senior Douglass. At the time of their appointment as agents for plaintiff and his assignors they had nothing to do save to collect the rentals for lands, which had already been rented for the farming season, which was then well advanced. They were unable to procure an agency to sell; but they did inform the heirs as to certain offers which had been made upon the lands. These will be pointed out more at length as we proceed.

In a letter dated April 23, 1900, which was before the death of Douglass, Sr., defendants wrote plaintiff as follows:

Replying to your letter of the 20th inst., would say that Mr. C. H. Douglass has already commenced suit in the district court in this county to have the deeds given by him set aside. The three thousand one hundred and fifty acres deeds are due as follows, to wit: Pottawattamie County, County, one thousand four hundred acres, worth \$40 to \$45 an acre; Mills County, six hundred acres, worth \$40 to \$45 an acre; Shelby County, nine hundred and ten acres, worth about \$35 an acre; Harrison County, two hundred and forty acres, worth \$30 an acre. Sheriff's deeds are due as follows, to wit: Pottawattamie County, June 12th; Mills County, June 22d; Shelby County,

October 10th; Harrison County, November 28th. Sales may be redeemed separately.

Again, on July 21, 1900, they wrote him the following, among other things:

Have been told to-day that the partition suit will be dropped; this would indicate that Mr. Hess is willing to unite with you in the sale of the lands. Can you advise us now whether the lands will be put on the market this fall? We can sell a small part of it as soon as you are ready, as we have already had calls for it. If you expect to sell the land in a body, we should like a chance to bid on it; and, if it is to be sold by you in parcels, we hope to act as your agent in this matter. We write you in regard to the matter now, as we are inclined to think that others may attempt to control it.

On July 23d they wrote:

Flickinger Bros. tell us that they wrote you yesterday fully in regard to the attitude of Mr. Hess in the matter of the partition suit. We understand that they are anxious to dispose of the land to the best possible advantage; and, as you seem to be of the same mind, we presume you will be ready to entertain offers for the various tracts. There is one eighty that we think we can sell for \$50 to an adjoining landowner.

On July 26th they wrote:

We thank you for your letter of the 24th inst., just received. We thought that possibly Day & Hess might try to get to handle the land for you, inasmuch as they now own an interest in it. The land would probably bring about \$100,000 if sold in lump; while it can be sold in parcels to aggregate \$120,000. This is allowing that the land in this and Mills Counties will bring about \$40 an acre and the land in Shelby and Harrison Counties \$30 per acre. We had a call this morning from a man who wishes to buy one hundred and twenty acres adjoining his farm, and we told him that we would probably be able to make him a price in about a month.

On July 30th they wrote saying, among other things:

We think it only fair to us that we should be allowed to handle these lands for the heirs, and believe that your interests would be better protected in our hands. We have this day written to all of the heirs concerning this matter, and trust it is not too late for the sale of the lands to be placed in our hands. Anything you can do for us in this matter will be very much appreciated.

Again on August 8th they wrote, among other things, the following:

After writing you July 30th, I went to Chicago, Milwaukee, and St. Paul to see your brothers, thinking that probably Mr. Day was endeavoring to negotiate with them direct to represent their interests here. I found F. M. Douglass out of the city, but his brothers in Milwaukee and Chicago stated to me that they understood the land was in our charge; that they had never heard of the firm of Day & Hess, and, so far as they were concerned, had no desire whatever to make any change in their representatives here; but that the matter would be referred to your judgment, as you were familiar with it all. I was very glad of the assurance, as I felt that if the matter was left to you we had nothing to fear. . . . The tenants are very anxious to know whether or not the land will be sold, or whether they will be allowed to remain. One of them, who rents two hundred and forty acres, called this morning, and wishes to know as early as possible. We can sell this particular farm to one of the neighbors at a good price, if authorized. We have an offer of \$50 per acre cash for eighty acres in this county. This is a good stiff price, and the land ought to be sold. What can or shall we do in the matter? . . . Are we at liberty to enter into a contract for the sale of any of the land, if we received a good offer and can agree with Mr. Hess as to a price?

On August 11th they wrote:

We have an offer of \$50 per acre for two hundred

and fifty acres. This price is the very top and is a liberal price, and we are able to secure such an offer through the fact that the party owns the adjoining farm. He wishes to know as early as possible. We see no reason why the sale of the property could not be closed at once, if agreeable to you. We could submit the matter to Mr. Day to have him agree to the price, and we could then hold the proceeds for distribution at the proper time, or they could be deposited in any bank here in the city, if more satisfactory to Mr. Day.

On August 20th B. Douglass wrote defendants as follows: "When we are ready to sell, I think that you will have no difficulty in receiving the appointment from the entire Douglass interest. That is the result of my correspondence with the other members of the family."

Again on August 21st they said:

We have your telegram of the 20th inst., which reads: 'If you will offer \$13,000, each heir, will try to induce them to accept?' We hardly know how to answer you. We have written to a number of your brothers, as well as to Mrs. Fay, offering \$12,000 for each share. Did not expect to be able to buy them all, nor did we care to. Our idea was that, should we own a one-seventh interest, as Day & Hess do, we would be in a better position to retain control of the land, and would have equal rights with them, in addition to which we felt that there was every reason why you should wish us to act as your agents. As before written you, we have made promises to a great many of the tenants and others, with reference to this land, that the land would be for sale this fall, and would be sold through us. We also promised others that as soon as the land was for sale, we would notify them and give them an opportunity of purchasing it. We felt very anxious to be able to keep our promises, and when we received a letter from Mrs. Fay offering to take \$14,000 for her interest, we represented that we would pay her \$13,000. At the same time we felt that we offered a little more than we were justified in doing, and that we would not want to offer that much for each of the shares. We felt that in making the offer of \$12,000,

which we did make a few days ago with a view of buying but one, as we explained, we would be giving about all that could be realized for that interest in the land. Out of the three thousand one hundred and fifty acres, we can figure on about twelve hundred that we feel certain that we can sell in a short time. These twelve hundred acres are among the best and most desirable of the lands. A part of the land, especially the Shelby and Harrison County land, will drag along for some time, and can not be sold at anything like a good price. Mr. Korth writes us that the Shelby County land is worth \$25 to \$35 per acre. This will be a large deal, and one which you will realize is quite difficult for such as us to handle, as we would have to arrange to borrow the greater part of the money, and we are not certain as to whether or not we will be able to pay all cash or not. We are certain that we could pay \$40,000 to \$50,000 down, give a mortgage for the balance, payable on or before, five percent, stipulating that any part of the land would be released upon the payment of a certain price per acre. The mortgage would not then interfere with the sale. If we should sell some twelve hundred acres soon, we ought to be able to pay you all in the course of a few months. We will make you the following proposition: We will pay \$12,500 to each of the heirs, except Mrs. Fay, to whom we have agreed to pay \$13,000 for reasons which we have stated, providing we can make the arrangements for paying the same. We feel that this offer is a liberal one, as it is net to you, saving any further trouble in the matter of expense on mortgages or abstracts. We have tried to be perfectly frank, fair, and liberal with you in all of our dealings, and have given you from time to time the best information we had as to the true values of the land, not trying to hold values down in your eyes with any view of purchasing it ourselves. To sell the land will require a great deal of time, work, and energy; and we ought to be entitled to some profit, although it will be small, on the offer we have made you. Please wire us on receipt of this letter what you will recommend in the matter, so that we may make arrangements for the necessary funds in case the deal is consummated. You will remember that we hold about \$5,000 in our hands which belongs to the estate.

On August 22d they wrote:

We have your favor of the 20th inst., for which we thank you very much. The matter seems to have adjusted itself, as we felt that it must in the end; and yet we could not help but feel more or less uneasy on account of the representations made by Mr. Day, as we were not able to communicate with you, owing to your absence from New York. We wrote you yesterday in regard to the purchase of the land and are awaiting your reply. We believe that we can make arrangements for the payment all right, in case you desire to accept our offer. In case we purchase, there are some matters that we would need to adjust with you, and think it advisable for one of us to come to New York for that purpose. As we wrote you yesterday, we feel that we have made a very liberal offer, and believe that there would be no advantage to the heirs in disposing of the property otherwise.

Plaintiff, in response to this letter, said:

I am in receipt of your favor of August 22d. I hardly think it will be necessary for any one to come to New York, but if you so desire, I shall be very glad to see you. There will be no necessity for any one coming until after we submit the offer you make to the other heirs and have obtained their acceptance or rejection. That will probably be in the course of a week or ten days. I wrote to all of them yesterday, and it may be that they will conclude not to accept. As soon as I hear from them I will advise you. The fact that you pay Mrs. Fay a little more than the rest may embarrass me. As you know, Flickinger Bros. are our counsel in Council Bluffs, and it appears to me that it will be advisable for them to look after all the legal matters relating to the settlement, provided it is consummated. Do you think there would be any objections to my notifying them of the offer you have made?

Again on August 27th they said:

Your favor of the 25th is at hand. I think it better that I should come to New York and talk matters over
Vol. 147 IA.—27.

with you. Shall leave home to-night. Shall stop and see your brother in Chicago and may run up to Milwaukee. I prefer that you say nothing to Flickinger Bros. yet for reasons that I will explain to you when I reach New York.

On July 30, 1900, defendants wrote a letter to Robert B. Douglass, which contained the following, among other statements:

For two years past we acted as agents for your father in rental and care of the lands in this state. We did so at one-half the regular commission for such work, on a statement made by your father that when the land was placed in the market for sale, we would undoubtedly have the handling of it and make a commission. . . . As you are aware, the interest of C. H. Douglass has passed by foreclosure and is now owned by J. P. Hess, trustee, of the firm of Day & Hess. Day called on all the tenants, notified them that their leases would terminate March 1st, that the land was for sale, and that if they wanted longer, they must purchase it. Day said they had been appointed agents, with powers of attorney on the road. This is a great surprise to us, as we had received a letter from B. Douglass, Jr., dated July 24th, in which he said: 'As I formerly wrote, if I am elected to select any agent for the sale of the property, I know of no one that would please me better than you.' We have not corresponded with any of the heirs in regard to their property except Mr. F. M. Douglass and Benjamin Douglass, Jr., as they were appointed executors of your father's estate, had been there, were familiar with all of the circumstances, and supposed their recommendation would have considerable weight with the balance. We can hardly believe that Mr. Day has correctly represented the matter to us, as Mr. B. Douglass, Jr., has a number of times assured us that, so far as he was concerned, we would have the sale of the lands. We are probably more familiar with the conditions and values of this property than anybody else here, inasmuch as we have visited it a number of times during the past two years. It seems to us entirely unfair that Day & Hess should act as the agent in the sale of this property simply because they control a one-seventh

interest, and think it is due to us that we should act for you in this matter. We have had calls for a number of pieces of the land, and are prepared to sell as soon as it is placed upon the market.

On August 4th they wrote William A. Douglass, and stated these, among other things:

On my way home it occurred to me that I might be able to purchase the one-seventh interest owned by Mr. Hess myself. . . . I do not think Mr. Hess would sell it to me, but might to one of your family. Will you write to him, asking him what he would accept for his interest? If I can buy him out, it will do away with any trouble in selling the lands, and will assist in expediting matters.

On August 25th defendants wrote a letter to W. A. Douglass in which, among other things, they stated:

We have made a very liberal offer, which we believe it will be to your interest to accept.

On September 6th they wrote:

In regard to the profits that we may make on the sale of these lands, will say that they will represent a great deal of hard work that has already been done during the past two years, and what we will have to do in the next two years. It has been anything but a bed of roses to handle this business, we can assure you. Please execute and return the deed as soon as convenient.

Again on September 15th they stated to W. A. Douglass, in a letter under that date:

We have just sold two hundred and forty acres in this county for \$13,200. The purchaser owns one hundred and twenty acres of well-improved land adjoining this, and he puts in the three hundred and sixty acres for a loan of \$10,000, running five years at five percent. Would you like to have this loan as an investment?

One of defendants went to New York to interview plaintiff, and while there dictated the following offer for the interests of the various heirs in the property:

New York, August 31, 1900. We submit the following proposition for the purchase of the undivided five-sevenths interest owned by W. A. George, Frank M., Benjamin, Jr., and R. D. Douglass in lands in Pottawattamie, Mills, Shelby, and Harrison Counties, Iowa, being the land deeded to them by their father, Benjamin Douglass: We will pay for said undivided five-sevenths interest \$62,500, and assume two liens now of record against said land, aggregating \$30,000, less the amount of the net assets of the estate of B. Douglass, deceased, which said assets you are to agree shall not be less than \$5,000. When the deed to said land has been executed, will pay the sum of \$25,000 in cash, which shall be applied with \$5,000 to be advanced in the sale of said liens for \$30,000; the executors of the estate of B. Douglass, deceased, to enter into contract to pay over to us at the closing of the estate the full amount of the net assets of the estate of the said B. Douglass, less \$5,000, as above suggested. For balance of purchase price, will execute first mortgage on or before one year, five percent interest, containing stipulation that any parcel or part of said land will be released upon the payment of \$30 per acre for the land. Possession of the land to be given as of March 1, 1900. It is our intention to at once enter into contracts for the sale of this land, and to close sales as soon as you are able to give clear title. It is our impression that we will be able to pay an additional twenty or twenty-five thousand for sales of the land by the time you are ready to deliver deeds. This offer to stand until September 10, 1900. [Signed] Lougee & Lougee.

The preponderance of the testimony shows that at various times defendants orally represented that the property, if sold in bulk, was worth \$100,000, and if sold in small tracts or parcels to suit the purchaser, it was worth \$120,000. In the first letter the values were fixed at approximately from \$119,000 to \$129,000, and in a letter

of June 15th the value of Chas. H. Douglass' interest is fixed at \$15,000, less liens. These values were fixed when defendants were seeking to become agents for the sale of the lands. There is no doubt that they advised plaintiff, or his assignors as to all offers they had for the lands, or any part thereof, and there is no suggestion of any concealment on their part. Plaintiffs, or some of them, were negotiating with others for the sale of the lands. Plaintiff and some of his assignors are experienced business men. They are connected with the well-known commercial agency of R. G. Dun & Co., and not novices in business or unaware of the ways of the world. They had the matter of sale under consideration for some time, but never made defendants their agents for the sale of the lands. True, they say that they relied upon defendants' estimates as to the value of the property, and that it was in fact worth much more than it was represented to be. They were aware, however, that defendants were buying the land for speculative purposes, and that if they bought the same *en masse*, they expected to make at least \$20,000 on it. They were not deceived as to offers that had been made the defendants while they were agents for the collection of the rents, and it is not shown that defendants withheld any information which came to them, save what was generally known regarding the upward tendency of prices for land in this and adjoining states, commencing about the year 1900. True, defendants showed anxiety to get an agency for the sale of the lands, and latterly became especially anxious to buy because others were acquiring interests in the property; but this was apparent to the defendants, and if any suspicion is to be attached to this haste, plaintiffs were fully advised thereof. The preponderance of the testimony from men who are acquainted with land values at the time indicates that defendants' estimates as to values was not far out of the way. That these statements were regarded as estimates

is plainly apparent from the correspondence which passed between the parties. There is nothing to indicate that plaintiff or his assignors were placing any particular confidence in the statements made by defendants as to values. Others were trying to secure their interests, and offers had been made them therefor.

In all matters relating to the subject-matter of the agency defendants were required to exercise the utmost good faith. Loyalty and fair dealing are duties which an agent owes to his principal, and he can not use his agency for his own profit. But an agent to lease may enter into negotiations for, and become the purchaser of, property which is the subject of the agency, provided he does not use his position as a means to that end, and makes full disclosure of all matters which the principal is entitled to know because of the relations between them. The nature of the agency is material as bearing upon the duty which the agent owes to his superior. Thus an agent to sell can not, for various reasons, become the purchaser at his own sale. The law will not allow him to act in both capacities; but an agent to collect rents or to lease may buy the property from his principal, provided he takes no advantage of his relation, and the principal is advised of all matters which it is the agent's duty to communicate. If the agency is such that the agent is not expected or required to advise his principal as to the value of the lands, and the principal refuses to confer upon the agent the power of sale, but the agent, without fraud, enters into negotiations for the purchase of the lands, there is no reason, either in law or morals, why he can not purchase the property just as a stranger might do. If any trust or confidence is reposed in the agent, and the relations are such as to call for disclosures as to offers for or values placed upon the property, then an agent, who himself becomes a purchaser, has the *onus* of

showing that he made full disclosures and took no advantage of his situation.

At one time defendants were called upon for a statement regarding the values of the land. To this they responded as shown in the first letter quoted. No one contends that the values were materially underestimated in this letter. When they entered into negotiations for the purchase of the property, they did not place the values so high. Rather than being an evidence of fraud, this is simply a manifestation of a trait of human nature with which all persons who know of the ways of the world are familiar. It is true that within a few days after defendants secured their interest they, in conjunction with the other owners of the land, fixed a much higher price upon the land for selling purposes than they had estimated it was worth when they were negotiating for its purchase from plaintiff and his assignors; but this is not in itself evidence of fraud or deceit. Defendants were buying the land to sell for a profit, and the estimates made were the outside prices. Either of the owners was authorized to sell for \$5 per acre less than the estimate. It is also true that defendants made a snug sum on their investment, but this was largely due to the rapid increase in land values from the time of their purchase down to the time of sale. Doubtless since these sales were made the purchasers have profited from their investments quite as much as defendants did from theirs. Vast sums of money have been made in real estate during the past eight or nine years, and no one ten years ago had the prescience to know of this advance.

Defendants were never agents in any way for the Shelby County lands, and they never had anything to do with them until they purchased an interest therein. Plaintiff had another agent for these. Yet upon these lands defendants made quite as much as upon their other purchases. Even were defendants required to make a show-

ing of absolute good faith and fair dealing, we should be inclined to hold that they had done so, and that under all the circumstances disclosed their purchases were and are fair and equitable.

The case is peculiar, however, in that plaintiff and some of his assignors are shrewd and capable business men. They had close connection with representatives of the great mercantile agency of R. G. Dun & Co., and could easily have informed themselves regarding the values of the land. Some of the heirs of the senior Douglass had seen part of the lands at least, and had undertaken to find out its value before the sales were made to defendants. They did not indicate, save in a letter written before the death of the senior Douglass, that they were relying upon defendants' statements as to the value of the lands. In response to their inquiries defendants, who were not then in the attitude of purchasers, furnished them a statement as to values which is not challenged. It was not for some months thereafter, and not until others were acquiring interests in the property, that defendants undertook to buy. Naturally they then wished to buy as cheaply as they could, and there is nothing from that time forward indicating that plaintiff, or his assignors, were depending upon them in any manner. So far as shown, from the time of defendants' first attempt to buy, down to the time of sale, the parties were "at arm's length," and no reason is suggested why defendants could not buy the property or plaintiff's interest therein.

The only suggestion made here is one of law, and that is that the transaction, having been seasonably challenged, is presumptively fraudulent, and the burden is upon defendants to show good faith and fair dealing. The rule is not quite so broad as stated by appellant. Much, of course, depends upon the nature of the agency and the degree of confidence and trust reposed in the agent. If the agency is to sell, and the agent is himself

the buyer, there is no doubt about the rule being as contended for appellant. But if the agency is for another purpose, and the purchase is quite outside any of the duties of the agency, then another rule applies. At most defendants, after the death of the senior Douglass, were agents for his executors in the collection of rents accruing before his death, and agents for the heirs in the collection of the rents accruing after that time. They never made any leases under that agency, nor were they authorized or requested so to do. They undertook to buy the property from the heirs in competition with others, and were successful. Even were they required to show good faith, equity, and fair dealing, we should be constrained to hold that they had done so; but, under the facts disclosed, we are constrained to hold that the parties were dealing with each other at arm's length, and that defendants were not guilty of any actionable fraud. It appears from the record that two of the heirs, or one of them and the grantee of another, sold their interests to strangers to this litigation. One for \$14,000, and the other for less than \$12,000. This is indicative, not only of the value of the land, but shows that plaintiff and his assignors had information, in addition to that received from defendants, regarding the value of their interests in the land, and some of them had an opportunity to buy up one of these interests for a less amount than they received from defendants. The trial court gave the case patient consideration, and its finding must, of course, be given some weight. Some of the witnesses were before that court, and it had advantages which we do not possess.

II. As to defendants' appeal. They claim that they are entitled to judgment for five-sevenths of the value of the Santa Barbara, Cal., real estate, or five-sevenths of the amount received therefor, on the theory that they assumed the liens or trusts upon the property purchased by them in this state

2. ESTATES OF
DECEDENTS:
legacies: satis-
faction.

subject to a deduction of the amount of the other assets belonging to the decedent, Benjamin Douglass, Sr. They claim that among these assets was the Santa Barbara real estate, the proceeds of which they are entitled to. We can not agree to this proposition. Doubtless, if this property, or the proceeds thereof, were a part of the assets of Benjamin Douglass, Sr.'s, estate there might be something in defendants' present claim. This property was conveyed by the senior Douglass to plaintiff as trustee for the several heirs, subject to a life estate. The property was sold by the trustee, after the death of the grantor, for \$10,597.54, and the proceeds were divided among the beneficiaries under the deed. The deed conveying the Iowa property to plaintiff and the other heirs of the senior Douglass contained this provision:

The above-described real property is hereby charged with, and this conveyance is made subject to said charges—1st. The payment upon the death of the said Benjamin Douglass, one of the parties of the first part hereto, to said Louise Douglass, the other of said parties of the first part, in the event of his, the said Benjamin Douglass, dying before the said Louise Douglass, and there are not sufficient assets of his estate to pay the same, of a legacy of \$20,000 which the said Benjamin Douglass, by his last will and testament had given to said Louise Douglass.

On the following day the deed to the Santa Barbara property was made to plaintiff as trustee, and plaintiff executed, delivered, and had recorded a declaration of trust reading as follows:

To all whom these Presents shall come—Greeting: Whereas, Benjamin Douglass and Louise Douglass, his wife, of the city and county of Santa Barbara, Cal., have granted and conveyed to me in fee simple for a consideration of ten dollars, by deed date of the 30th day of September, 1897, the following described lots and parcels of land, to wit: [here follows description of Santa Barbara home]

stead.] Now, know ye, that I, the said Benjamin Douglass, Jr., make known and declare that the said premises were conveyed to me in trust for George Douglass, Robert Dun Douglass, William Angus Douglass, Benjamin Douglass, Jr., Frank Middleton Douglass, Mrs. Charles Howard Douglass, and Mrs. Mary Douglass Fay, share and share alike. In witness whereof, I have hereunto set my hand and seal the 8th day of November, 1897. [Signed] Benjamin Douglass, Jr.

These transactions amounted to a complete disposition of the Santa Barbara property, and the senior Douglass had nothing left therein, save a life estate. The instruments were none of them testamentary in character, but passed a present interest in and to the land. Upon the death of the senior Douglass there was nothing left in this California property for his estate. No part of the proceeds should have been applied upon the payment of the legacy to the wife. Moreover, this matter seems to have been fully adjudicated in the California courts, and the matter can not be reviewed here.

No error appears, and the judgment on both appeals must be, and it is, *affirmed*.

JOHN COTTON, Appellee, v. CENTER COAL MINING Co.,
Appellant.

Mines and mining: EXCLUSION OF EVIDENCE: HARMLESS ERROR. The exclusion of testimony is harmless error where the same witness is subsequently permitted without objection to detail the facts. Thus the exclusion of the evidence of an experienced miner who was a timberman in the mine when an employee was injured, to the effect that on the day of his injury he sounded the roof of the mine from which slate fell causing the injury and found that it was then safe, while erroneous was not prejudicial, in view of the fact that like evidence was subsequently admitted without objection.

Same: NEGLIGENCE: ASSUMPTION OF RISK: INSTRUCTION. Negligence 2 is to be determined, not as an abstract proposition, but concretely as applied to the facts of a given case, and the test is, what would a reasonably prudent person have done under like or similar circumstances. In this action plaintiff was injured by the fall of slate from the roof of the mine in which he was employed, and he claims that the master had previously promised to remedy the defect in the roof. The court instructed that if such promise was made and if the danger was not great and constant, and that if a reasonably prudent person would have remained in the service, continuing to pass under the roof, such promise would relieve plaintiff from the charge of assumption of risk. *Held*, that the instruction was not prejudicial because failing to state the test of negligence to be what a prudent person would have done *under the same or similar circumstances*; there being nothing in the charge negativing the rule and the rule being correctly stated in other instructions, one of which referred directly to plaintiff's contributory negligence.

Same: SAFE PLACE TO WORK: DUTY TO WARN: INSTRUCTIONS. Where 3 the evidence was such as to show that the duty to inspect the roof at the time plaintiff complained of its condition was not mutual, but that the master had or should have had knowledge of facts which plaintiff did not possess and was not bound to discover, such as the fall of slate on the morning of the accident of which plaintiff disclaimed any knowledge, an instruction that the law imposed upon the master the duty to use reasonable care to provide safe passage ways in the mine for workmen, and that if he failed to warn plaintiff of the danger incident to the condition of the roof such failure would constitute negligence was proper.

Same: CONTRIBUTORY NEGLIGENCE: INSTRUCTION. Where it appeared, 4 as in this case, that plaintiff did not know that the mine entry having the defective roof in question had been closed, that other employees were using it, that it was the master's duty to inspect and repair the roof, that the roof to some extent had been propped up where the slate fell, and as plaintiff was entitled to show continued use of the entry by other employees, on the theory that it was an invitation to him to use it and an implied representation that it was safe, which facts were proper to be considered as bearing upon plaintiff's negligence although he did not know what particular employees passed through the entry at any given time, requested instructions to the effect that other employees passed under the defective roof shortly prior to plaintiff's injury should not be considered as bearing upon the question of plaintiff's negligence in using the entry because it was not clear that plaintiff

knew that other employees had used the same, were properly refused.

Same. As it was not plaintiff's unqualified duty to inspect the roof in question before passing under it, instructions that if plaintiff could have ascertained whether the portion which fell was safe by inspecting the same before passing under it, and that if it was not more dangerous to tap the roof for the purpose of inspection than to pass under it without doing so he was negligent in failing to make the examination, were properly refused.

Same. As it was shown that plaintiff had informed the pit boss of a previous fall of slate and that he promised to place supports under the roof, and there was evidence that the same was done to some extent at the place where the slate fell injuring plaintiff, instructions that if there had been a previous fall of slate at or near that point, of which plaintiff had knowledge, and if he knew the condition of the roof and upon inspection knew that the loose portion of the roof had not been taken down or supported, and the same fell causing his injury, he was negligent in going thereunder at the time of the accident without taking precautions for his safety, were also properly refused.

Contributory Negligence: EVIDENCE. It appears from the evidence in this case that plaintiff made complaint of the defective condition of the roof in the mine entry in question and that there had been a promise to remedy it, which was partially done, but that the entry was kept open without notice of danger; that the master claimed there had been a fall of slate from the roof on the day of the accident but plaintiff denied knowledge thereof. *Held*, that as the master was under a continuing duty to keep the roof safe, upon the performance of which duty the plaintiff had a right to rely, negligence of plaintiff in passing under the defective roof was not established as a matter of law.

Appeal from Polk District Court.—Hon. W. H. McHENRY, Judge.

TUESDAY, NOVEMBER 23, 1909.

REHEARING DENIED SATURDAY, MAY 14, 1910.

ACTION to recover damages for personal injuries received by plaintiff due to a fall of slate in a roof of defendant's mine. The case was tried to a jury, resulting

in a verdict and judgment for plaintiff, and defendant appeals.—*Affirmed.*

Clark & Hutchinson and *A. A. McLaughlin*, for appellant.

Thos. A. Cheshire and *Edwin Proctor*, for appellee.

DEEMER, J.—Defendant is operating a coal mine in Polk County, Iowa, and plaintiff was a miner in its employ at the time of the happening of the accident complained of. Plaintiff was about forty-six years of age, and had been engaged in mining coal for many years, twenty-five of which were in mines in the vicinity of Des Moines. On the day in question plaintiff was working in what was known as room No. 2, off of what was called the eighth north entry, and, while passing from this room to his toolbox some distance down the entryway, he was injured by a fall of slate from the roof of the entry. The entryways were not timbered, save at places where it was deemed necessary, and this eighth entry was only partially timbered. Plaintiff claims:

That three or four days before the accident in which he was injured there was a fall of slate in the entry at about the place where he was injured, and at that time he sounded the roof at the place where he was hurt and found the same sounded hollow and drummy, showing that the roof was loose and likely to fall. That he then complained to Isaac Evans, the pit boss, that it was unsafe and should be timbered, and that Evans sounded the roof in his presence, and plaintiff observed that it sounded hollow and drummy. He also claims that Evans promised to timber it. It appears that after talking with Evans, and procuring his promise to timber the room, plaintiff paid no further attention to the roof of the entry at the place where it was loose. On the morning of the 21st of September, 1904, plaintiff went to work soon after seven o'clock. He had sent out one or two cars of coal,

and had drilled some holes, and was ready to put in the charge of powder, and started to take his boring machine to his toolbox down the entry, and passed out into the entry and beneath this loose and dangerous roof without looking at it, and without sounding it or taking any precaution to ascertain its condition, or to see whether he could safely go under it. When beneath the loose roof, it fell, and caused the injuries of which he complains.

Defendant contends that it had no knowledge that this roof was loose before the day of the accident, and denies that plaintiff or any one else ever complained to Isaac Evans, the pit boss, or any one else concerning same. It claims that the roof of the entry was inspected every morning. It further claims that there was a fall of slate at this place on the morning of the accident a short time before plaintiff was hurt, and that plaintiff was warned thereof. It also claims that the timbermen were at once notified to timber the roof at the place of the fall and make it safe, and that they arrived and commenced work within a few minutes thereafter, Isaac Evans having guarded the place from the time he was advised of the fall until the timbermen arrived; that the fall of slate on that morning covered the entire floor of the entry, and was from a foot to eighteen inches thick in the center, tapering off at the sides. It further claims that the timbermen had miners' lamps in their caps, and immediately commenced work preparing the place for timbers, and that, while they were so employed, plaintiff came from his room with his drill in his hands, passed the timbermen at work, asked no questions, did not stop to look at or examine the roof, but, notwithstanding warning called to him by both timbermen, climbed over the mass of slate and rock that had fallen from the roof, and just as he was almost clear of the fall, the rock from the roof fell upon him, and caused the injuries complained of.

Under this state of the record, defendant contends

that plaintiff was guilty of contributory negligence as a matter of law, and that he assumed the risk incident to the defective condition of the roof. Appellant also assigns many errors in the rulings of the trial court, claims that the verdict is without support in the testimony, and is contrary to the instructions given to the jury. Plaintiff charges that defendant was negligent in the following particulars:

- (1) In not taking down this loose slate and in permitting it to be and remain in the roof of the entry.
- (2) In not heeding the repeated warnings that the slate in the roof of the entry at this point was loose and dangerous.
- (3) In not taking down this loose slate, and in failing to timber or prop the entry at the point where this loose slate was hanging in the roof, so that the same would not fall upon workmen passing through the entry.
- (4) In not using ordinary care to furnish the plaintiff a reasonably safe place to go and come to and from his place of work.
- (5) In not informing the plaintiff that there was loose slate in the roof of the entry at the point where he was injured, and in failing to warn him of the danger thereof.

In an amendment to the petition plaintiff alleged: "That the defendant was negligent in the following additional particulars to that stated in the original petition: That it did not timber the entry at the place where plaintiff was injured, as its pit boss and manager Isaac Evans, had agreed to do when requested by the plaintiff to timber said entry at said place three or four days before the date of the accident."

The issues which were submitted to the jury are disclosed by the following instruction:

And, as applied to this case, the allegations of negligence are that the defendant was negligent in not taking down the loose slate which hung from the roof of its

entry at the place where the plaintiff was hurt; in not timbering the roof of the said entry at the said place; in not removing the said slate, and timbering the said roof, after it was informed of the dangerous condition thereof, and had promised so to do; in not warning the plaintiff in this action of the dangerous condition thereof. And, with regard to these allegations, you are instructed that the law imposes upon the defendant in this action the duty to use reasonable caution and care for the purpose of providing safe entries through which its workmen may go and come to and from their work, and that if, with regard to any of the said allegations of negligence, there was a failure upon the part of the defendant to use reasonable and ordinary care in the respects herein complained of, such failure would constitute negligence.

In addition to its general verdict for plaintiff upon the negligence charged, the jury returned answers to the following special interrogatories:

Interrogatory 1. Was there a mass of slate lying on the floor of the entry complained of at and before the time of the accident complained of between the mouth of plaintiff's room and the place where he was injured?

Interrogatory 2. Did the plaintiff pass timbermen, Baker and Morris, engaged in timbering the entry complained of in going from the mouth of his room to the place where he was injured just before the accident?

The answer to each of these was "No."

I. We shall first consider the only ruling upon the introduction of testimony which is complained of. Appellant produced as a witness an experienced miner who was a timberman at the time plaintiff was injured, and who, after testifying to the condition of the entryway, was asked the following questions, upon which rulings were made as indicated: "Q. State whether or not when you sounded this roof on the morning before the accident,

1. MINES AND
MINING;
exclusion of
evidence:
harmless
error.

or what, in your judgment, was the condition of this roof that morning at the place where the accident happened? A. It was safe the morning before. (Plaintiff moves to strike out the answer as incompetent. Sustained. Plaintiff excepts.) Q. What I am asking is, what your judgment is. What in your judgment was the condition of the roof at this place the morning before the accident? A. The morning before the accident I pronounced it safe and sound. Q. You mean that is your judgment? A. Yes. (Plaintiff moves to strike out the answer as incompetent. Sustained. Defendant excepts.)" Doubtless these rulings were erroneous under the rule adopted by this court in *Taylor v. Coal Co.*, 110 Iowa, 40; *Betts v. Railroad Co.*, 92 Iowa, 343; *Hammer v. Janowitz*, 131 Iowa, 20, and other like cases; but the error was without prejudice for the reason that this same witness testified without objection that he sounded the roof in question on the morning of the day of the accident, found it solid and sound, and as firm as an anvil. He also testified that he tapped the roof on this morning every two or three feet, and that it was solid and sound as far as he knew. This cured any error in the ruling complained of.

II. Several of the instructions are challenged, among others the seventh, which contains the following statement: "If, therefore, notwithstanding such promise, the plaintiff could not remain in defendant's

2. SAME:
negligence:
assumption
of risk:
instruction.

employment and continue to pass through the said entry without constant and immediate danger, the character of which was fully known to the plaintiff, he must then be held to have assumed such risk. But if such promise was made, and if the danger was not great and constant, and if a reasonably prudent person would have remained in such employment and continued to pass through the said entry-way, then such promise may be deemed to have relieved the plaintiff from the charge of having assumed the

risk of such employment." The exact complaint is that the test is not what a reasonably prudent person would have done; but as to what such a person would have done *under the same or similar circumstances*. It is the omission of the italicized words of which defendant complains. Negligence, of course, is to be determined, not as an abstract proposition, but concretely and as applied to the facts of a given case, and the criterion is as to what a reasonably prudent person would have done under like or similar circumstances. *Galloway v. Railroad Co.*, 87 Iowa, 458. But there is nothing in the instruction which negatives this thought, and the matter is correctly expressed in other instructions given by the court, notably the fourth, which referred directly to plaintiff's contributory negligence. There was no conflict in these instructions, and the statement found in the seventh, although perhaps not as full as it should have been, was not in itself erroneous, and, as the matter was fully covered in other paragraphs of the charge, no prejudice resulted. This view is sustained by the following, among other, cases: *Hart v. Railroad Co.*, 109 Iowa, 631; *Little v. McGuire*, 43 Iowa, 447; *Rusch v. City*, 6 Iowa, 443; *Devine v. Railroad Co.*, 100 Iowa, 692. Other cases might be cited in support of this proposition, but these seem to be sufficient. The Supreme Court of Indiana appears to have taken a contrary view in *Railroad Co. v. Marion*, 104 Ind. 239 (3 N. E. 874); but our rule is opposed to the doctrine there announced, and we see no good reason for changing it.

Instruction 3, already quoted, is complained of because it submits to the jury the question of whether or not defendant was negligent in failing to warn plaintiff

3. SAME: safe place to work: duty to warn: instructions. of the danger to be apprehended from the loose roof. It is argued that he knew as much about it as the defendant, and that defendant was under no duty to warn him of such danger.

If appellant's premise were correct, his conclusion is undoubtedly good. *Magee v. Railroad Co.*, 82 Iowa, 249; *McCarthy v. Mulgrew*, 107 Iowa, 76, and other like cases. But there was evidence for plaintiff, showing that three or four days before his injury he had observed a fall of slate near the place where he was subsequently injured; that he called the attention of defendants' pit boss to the condition of the roof; that the pit boss sounded the roof, found it "sort of drummy," and promised to fix it; that thereafter one set of timbers was put in near the mouth and south of plaintiff's room; and it further appears that defendant had two expert timbermen whose duty it was to daily sound and inspect all roofs and to protect the same by timbering, which fact was known to plaintiff. There was also testimony to the effect that this entryway was not closed or barricaded, but that it was constantly used by other employees in the mine from the time of the first fall of slate, of which plaintiff had knowledge, down to the time of the accident, and that plaintiff had not tapped or inspected the roof from the time he complained to the pit boss down to the time he was injured. It thus appears that the duty of inspecting the roof was not mutual, and that defendant had, or should have had, knowledge of facts which plaintiff did not possess, and was not bound to discover, among other things, the fall of slate on the morning of the accident of which plaintiff said he did not know. The jury in a special interrogatory found that plaintiff did not have this knowledge. So much as to the instructions given.

III. As to the instructions refused: In what has already been said, we have disposed of appellant's contention that the trial court should have given its ninth and tenth requests. In requests No. twenty-eight and twenty-nine the court was asked to instruct as follows:

4. SAME:
contributory
negligence:
instructions.

lant's contention that the trial court should have given its ninth and tenth requests. In

No. 28. The fact that Isaac Evans or any other employee in defendant's mine went beneath the loose slate that fell upon plaintiff a short time before plaintiff was injured will not be considered by you as bearing upon the question of whether plaintiff was negligent in going beneath the same at the time of the accident. It is not claimed that plaintiff knew that said Evans or either of said other employees had gone beneath said loose roof at said time, and their having gone under the same at said time could not have influenced the plaintiff, nor could the same have affected his conduct in going beneath said loose roof at the time complained of.

No. 29. You are instructed that the fact that Isaac Evans and the timbermen, Baker and Morris, passed under the loose slate that fell upon the plaintiff, under the circumstances shown in the evidence, should not be considered by you in determining whether plaintiff was guilty of negligence in passing under the same as the time of the accident.

As applied to the facts of the case, there was no error in refusing these requests. It is true that it was not shown that plaintiff had knowledge that these particular persons had passed through the entry, but he did know that it had not been barricaded or closed to use; that employees generally were using it, as the testimony of the witnesses referred to in the instruction clearly showed; that it was defendant's duty to inspect the roof and keep it in repair; and that some timbers had been put in near the place where the roof fell. It was proper, then, for plaintiff to show the continued use of the entryway by the various persons who had passed through it, and for the jury to consider the fact that it was being so used, as bearing upon the question of plaintiff's negligence, although he did not know just who the men were who had passed through at any given time. If plaintiff were relying simply upon the fact that these two particular persons had passed through the entry as a justification for his attempt to do so, the instructions asked should have

been given. But such is not the situation. Plaintiff proved that these men and others went through, and that defendant had not barricaded or closed the passage, but had allowed it to be used upon the theory that this was an invitation to him to use it, and an implied representation under all the facts that it was safe for use. With this thought in mind, it is apparent that the instructions, if given, would have been erroneous. *Rumpel v. Railroad Co.*, 4 Idaho, 13 (35 Pac. 700, 22 L. R. A. 725), relied upon by appellant, is not in point, as an examination will show. There was no invitation to plaintiff to crawl under the cars or take the course he did. Here there was an entryway which plaintiff was invited to use, and which he had a right to use, unless he knew it was dangerous to do so. The fact that it was used generally by employees was a proper circumstance to be considered by the jury in view of the entire record showing promise of repair, duty of inspection, etc., although plaintiff did not know what particular men were using the entry.

Defendant also asked the following instructions:

No. 15. If you find from the evidence that plaintiff could have ascertained whether the portion of roof which fell upon him was safe by tapping the same with a pick
5. SAME. just before going beneath it, and that it was not more dangerous for him to tap said roof with a pick than to attempt to pass beneath it as he did, then you are instructed that plaintiff, in failing to test said roof by tapping the same with a pick, was guilty of contributory negligence, and can not recover.

No. 30. If you find from the evidence that there had been a fall of slate a few days before plaintiff was injured at or near the place where he was injured, and
6. SAME. that plaintiff knew thereof and sounded the roof of the entry at and around said place, and found the slate in the roof to be loose, and that the said roof, where sounded, sounded drummy, and further find that said loose or drummy portion of said roof had not been taken down or timbered before plaintiff's injury,

and that the same fell upon the plaintiff, then you are instructed that plaintiff in going under said loose or drummy slate or roof at the time of the accident, under the circumstances shown in the evidence, was guilty of negligence directly contributing to his injury, and your verdict should be, in the event you so find, for defendant.

No. 31. If you find from the evidence that there had been a fall of slate at or near the place where plaintiff was injured a few days before, and that plaintiff knew thereof, and sounded the roof around the place from which said slate had fallen, and found the same to be loose, and further find that said place had not been timbered before plaintiff was injured, and that plaintiff went beneath said loose slate or roof at the time of the accident without taking any precautions to ascertain whether he could do so with safety, then you are instructed that he was guilty of contributory negligence, and can not recover.

Instruction 15 was clearly erroneous, for under the facts disclosed it was not plaintiff's absolute duty to tap the roof of the entry before going under it. The same may be said of requests 30 and 31.

Plaintiff testified that, after the fall of slate some three or four days before his accident, he informed the pit boss and was promised that the roof would be fixed; and there was also testimony to the effect that thereafter some timbering was done by the defendant very near the place where the slate which injured plaintiff fell. In this situation it would have been error to have given the thirtieth and thirty-first instructions asked.

IV. The principal complaints made by appellant are, however, that the verdict is contrary to the instructions, contrary to law, without support in the testimony, and

is the result of passion and prejudice. It
^{7. CONTRIBUTORY NEGLIGENCE:} is argued with great confidence that plaintiff
evidence. was guilty of contributory negligence as a
matter of law, and that he assumed the risk incident to
the defects. These are the troublesome questions in the
case. This whole matter depends, as we view it, upon

the determination of the one pivotal question: Was there a fall of slate on the morning of the day when plaintiff was injured at or near the place of his injury of which he had, or should have had, knowledge, and, if so was he justified under all the circumstances in passing under the roof near where this fall had taken place. We do not think that under the record before us he assumed the risk because of defendant's failure to comply with the promise of its pit boss. It appears that it did put in some timbers at or near the place in question, that it kept the entryway open, and that it did not barricade it, or give any notice of danger. In these circumstances plaintiff was justified in passing along the entry and under the roof complained of, unless he knew or should, in the exercise of ordinary care, have known, not only that there was some danger at the place in question, but also that it was imprudent to pass under the roof in question. Defendant was under a continuing duty with reference to the roof, and plaintiff had the right to rely upon the performance of that duty by the defendant. He said that he did not know of any fall of slate on the morning of the day he was injured, and the jury found with him on this proposition. That being true, there was neither assumption of risk nor contributory negligence on his part—that is to say, we can not hold as a matter of law either that plaintiff assumed the risk or that he was guilty of contributory negligence without invading the province of the jury. On this theory the verdict is not contrary to the instructions. The case is close upon these questions, but, as they were for a jury, it is not our province to interfere.

Finding no prejudicial error in the record, the judgment must be, and it is, *affirmed*.

SCOTT LOGAN, Appellant, v. W. R. DAVIS.**Public Lands: RAILROAD GRANT: GOOD FAITH PURCHASER: EVIDENCE:**

I STATUTES. In this action the plaintiff is seeking to establish his title to unearned railroad land, and to which the railroad company never acquired title, under the Act of Congress providing that citizens of the United States who were good faith purchasers from a railroad company of lands erroneously certified or patented to it should be entitled to purchase the land of the government, as against the defendant who had taken possession of the land as a homestead entryman. Upon a review of the evidence it is held that plaintiff was not a good faith purchaser within the meaning of the Act of Congress.

It is also held that the Act of Congress in question does not apply to unearned lands purchased after the date of the Act.

Equitable Estoppel. One invoking the doctrine of equitable estoppel must show that he had no knowledge of the facts relied upon as constituting the estoppel, and no convenient and available means of acquiring such knowledge; and where the facts are known to both parties or both have the same means of ascertaining the facts there can be no estoppel.

Same. The act of an officer of the land department in permitting one to urge his claim as a contract purchaser of railroad lands which had been forfeited, and of which he was not a good faith purchaser, and the subsequent issuance of a patent for the land to him, will not operate as an estoppel against the claim of a homestead entryman so as to preclude the entryman from questioning the validity of plaintiff's patent in a suit by him to recover the land.

Public Lands: EQUITABLE TITLE: NOTICE. The plaintiff in this action at the time he secured his claimed interest in the land in controversy, having had actual notice of a hostile and superior title, acquired no equitable title to the property in himself.

Same: HOMESTEAD ENTRY: TRESPASS. The defendant in this action entered upon certain public lands at a time when it was not subject to public entry, invading at the time the actual but wrongful possession of plaintiff. Subsequently the land became subject to entry and defendant continued to occupy it-without protest, filing thereon a homestead claim, until it was erroneously patented to

plaintiff. *Held*, that as defendant had been for several years in peaceable and uninterrupted possession his homestead claim made in good faith was not subject to the objection that his original possession was obtained by trespass.

Appeal from O'Brien District Court.—Hon. DAVID MOULD,
Judge.

FRIDAY, FEBRUARY 11, 1910.

REHEARING DENIED SATURDAY, MAY 14, 1910.

THE opinion states the case.—*Affirmed*.

W. P. Briggs, for appellant.

Madison B. Davis and Edwin J. Stason, for appellee.

SHERWIN, J.—This is a suit for the recovery of real property; the plaintiff alleging that he is the absolute owner thereof, and that the defendant unlawfully keeps him out of possession. The land in controversy is within the limits of the grant by act of Congress approved May 12, 1864, chapter 84, granting lands to the state of Iowa "for the purpose of aiding in the construction of a railroad from Sioux City, in said state to the south line of the state of Minnesota at such point as the said state of Iowa may select, also to said state, for the use and benefit of the McGregor Western Railroad Company for the purpose of aiding in the construction of a railroad from a point at or near Main street, South McGregor, in a westerly direction . . . until it shall intersect with the said road running from Sioux City to the Minnesota state line." The grant was of every alternate odd-numbered section for ten sections in width on each side of the roads, and provides that the lands thereby granted should be subject to the disposal of the Legislature of

Iowa for the purposes aforesaid, and further provided: "When the Governor shall certify to the Secretary of the Interior that any section of ten consecutive miles of either of said roads is completed, . . . then the Secretary of the Interior shall issue to the state patents for one hundred sections of land for the benefit of the road having completed the ten consecutive miles as aforesaid." It was also provided further: "That if the said roads are not completed within ten years of their several acceptance of this grant, the said lands hereby granted and not patented shall revert to the state of Iowa for the purpose of securing the completion of the said roads within such time, not exceeding five years, and upon such terms as the state shall determine"—and, further that said lands shall not in any manner be disposed of or incumbered except as the same are patented under the provisions of this act, "and should the state fail to complete the said roads within five years after the ten years aforesaid, then said lands undisposed of as aforesaid shall revert to the United States." This grant was duly accepted by the state of Iowa and by the Sioux City & St. Paul Railroad Company by a resolution of its board of directors, dated September 19, 1866. The said company afterwards located its line of road, filled its map of location, which was accepted by the Secretary of the Interior, as the basis of the adjustment of the grant, and in August, 1867, all of the odd-numbered sections of land within the twenty-mile limits of the Sioux City & St. Paul Railroad, as shown by map of definite location, were withdrawn from sale or other disposition. During the year 1872 the Sioux City Company constructed its road from the Minnesota line south to Le Mars, a distance of fifty-six and one-fourth miles, and the construction of five ten-mile sections of the road was certified to the Secretary of the Interior, who caused to be issued to the state for the use and benefit of the Sioux City Company patents for land selected by it,

amounting to four hundred and seven thousand eight hundred and seventy and twenty-one hundredths acres, including the land in controversy. The Sioux City & St. Paul Company never constructed its line south from Le Mars, nor did the state cause that portion of the road to be constructed. By authority of the Legislature the state certified or patented to the Sioux City Company within the granted and indemnity limits a total of three hundred and twenty-two thousand four hundred and twelve and eighty-one hundredths acres. But the land in controversy was not included therein, nor was it ever certified or patented to any railroad company. In 1878 the Chicago, Milwaukee & St. Paul Railway Company, the successor of the McGregor Western Railway Company, completed the construction of its road to Sheldon, Iowa, where it intersected the line of the Sioux City & St. Paul Company, and soon thereafter it brought suit against the latter company for the purpose of determining the title to the land within the overlapping limits. That suit resulted in a decree giving to the Milwaukee Company lands which had been patented to the Sioux City Company and other lands not patented, but not the land in controversy herein. See *Sioux City & St. Paul R. Co. v. Chicago, M. & St. P. R. Co.*, 117 U. S. 406 (6 Sup. Ct. 790, 29 L. Ed. 928). While this suit between the two railroad companies was pending the Legislature in 1882 passed an act (Acts 19th General Assembly, chapter 107) resuming and vesting in the state "all lands and rights to lands granted" to the Sioux City Company under the act of Congress of May 12, 1864, and the acts of the General Assembly of the state, "which have not been earned by the said railroad company." March 27, 1884, the Legislature passed another act (Acts 20th General Assembly, chapter 71) which provided that the lands resumed and intended to be resumed by the act of 1882 were thereby relinquished and conveyed to the United States and the Governor was there-

by authorized and directed to certify to the Secretary of the Interior all lands which had theretofore been patented to the state to aid in the construction of the said railroad, and which had not been patented by the state to the Sioux City Company, except lands situated in the counties of Dickinson and O'Brien. This act was complied with in January, 1887, and twenty-six thousand one hundred and seventeen and thirty-two hundredths acres were so certified. The land in controversy being in O'Brien County was not included therein. Next in the chronology of events was the act of Congress of March 3, 1887 (Act March 3, 1887, chapter 376, 24 Stat. 556 [U. S. Comp. St. 1901, page 1595]), which act provides as follows:

Section 1. That the Secretary of the Interior be and is hereby authorized and directed to immediately adjust, in accordance with the decisions of the Supreme Court, each of the railroad land grants made by Congress to aid in the construction of railroads and heretofore unadjusted.

Sec. 2. That if it shall appear upon the completion of such adjustments respectively, or sooner, that lands have been, from any cause, heretofore erroneously certified or patented by the United States to or for the use or benefit of any company claiming by, through or under grant from the United States, to aid in the construction of a railroad, it shall be the duty of the Secretary of the Interior to thereupon demand from such company a relinquishment or reconveyance to the United States, of all such lands, whether within granted or indemnity limits.

Sec. 4. That as to all lands which have been so erroneously certified or patented as aforesaid, and which have been sold by the grantee company to citizens of the United States, or to persons who have declared their intention to become such citizens, the person or persons so purchasing in good faith, his heirs or assigns, shall be entitled to the land so purchased, upon making proof of the fact of such purchase at the proper land office, within such time and under such rules as may be prescribed by

the Secretary of the Interior, after the grants respectively shall have been adjusted.

At the time of the passage of this act, there were lands in O'Brien and Dickinson Counties that had been patented to the state, but never to the railroad company, and which the state still held, amounting to twenty-one thousand six hundred and ninety-two and eighteen one-hundredths acres. At this time also the Sioux City Company had received from the state patents for all of the lands it had earned or was entitled to under the grant. On August 11, 1887, the United States requested the state to reconvey to it the twenty-one thousand six hundred and ninety-two and eighteen one-hundredths acres, which included the land in controversy. On the 11th day of September, 1888, one Ellen M. Childs entered into a written contract with the Sioux City Company for the purchase of the land in controversy, making a small payment in cash and agreeing to pay the balance in installments. On the 4th day of October, 1889, the United States commenced an action against the Sioux City Company and others asking that its title to the twenty-one thousand six hundred and ninety-two and eighteen one-hundredths acres be quieted. Such action was finally tried, and resulted in a decree in favor of the United States. *Sioux City & St. Paul Railroad Company v. United States*, 159 U. S. 349 (16 Sup. Ct. 17, 40 L. Ed. 177). On October 8, 1889, the plaintiff took an assignment of the Childs contract, and on the same day entered into an agreement with the railroad company as follows:

That in the event of a decision in the above-entitled action in the United States Supreme Court adverse to said Sioux City & St. Paul Railroad Company as to the title to the said lands above described, the said parties of the second part will within ninety days thereafter surrender said original agreement and this modification thereof to the parties of the first part, at St. Paul, Minnesota, and re-

ceive therefor from the said parties of the first part, or either of them, the amount which has been paid on the said agreement on account of principal and interest mentioned in said original agreement, and the same to be received and accepted by said second parties in full settlement of all their rights under said original agreement and this modification thereof, and as a release of any and all claims suffered by said parties of the second part, their heirs, executors, administrators or assigns, by reason of the failure of the title of said parties of the first part to said land.

It was also agreed between the plaintiff and the company that the time of the payments would be extended, and that the company would pay the taxes.

The facts relative to the possession are as follows: Up until 1884 it was unimproved, vacant, wild prairie. In that year one Bierbower broke a few furrows around the entire half section, but did not reside on the land. In the same year one Peterson broke four or five acres along the south line of the land, but left during the same year, and made no claim to it. In the same year one Fitzgerald, who lived on adjacent land, broke six or seven acres in the northeast corner, and in 1885 cropped the land broken and continued in possession until 1890, except as hereinafter stated. In 1887 one Weir built a small house on the south half of the northwest quarter of the section, moved into the house with his family, and cultivated a part of the land. On the 1st of April, 1888, the defendant bought Weir's improvements and his interest in the land and moved into the house with his family, where he has lived up to the present time. Early in 1888 Fitzgerald leased the land of the Sioux City Company and remained in possession as its tenant that year, and the following year as the tenant of plaintiff's assignor. In the spring of 1888 the defendant sowed five or six acres of oats on breaking that had been done on the land before he moved on to it, but, when he attempted

to harvest the crop, Fitzgerald took possession thereof and retained same. May 1, 1890, the defendant with a gang of men with teams went on to the land in controversy and broke up that part of it which had not been broken, and has since then continued to farm the land. In due time the plaintiff made application for a patent as a purchaser from the railroad company, and the defendant made due and regular application for the entire quarter section, including the land in controversy, as a homestead. The Secretary of the Interior held in favor of the plaintiff, and a patent was issued to him in May, 1901. He then commenced this action, as we have heretofore stated. It was tried in equity and resulted in a decree for the defendant for the N. $\frac{1}{2}$ of N. W. $\frac{1}{4}$, 17-97-42, from which the plaintiff appeals. There was a decree for plaintiff as to lot three, and no appeal is taken therefrom.

The plaintiff relies for a reversal of the judgment upon the following propositions: First, because the defendant acquired possession of the land in controversy by trespass, and under this head it is said that the defendant could not at the time homestead more than eighty acres, and, farther, could then acquire no homestead rights therein because it was then reserved by the United States; second, an estoppel based on the fact that the plaintiff was a good-faith purchaser within the meaning of the act of Congress of 1887; and, further, under the same head, for the reason that the defendant was in privity with the United States, and must show that he is entitled to a patent under the homestead law; third, that both the United States and the defendant are estopped by the allegations of the former in its suit against the Sioux City Company; fourth, that, where one of two equitable titles of equal strength is joined with the legal title without notice of the other equity, the legal title can not be

successfully assailed by the holder of the other equity; and, fifth, the equities are with the plaintiff.

In support of the decree, the appellee contends that the act of May 12, 1864, was not a grant *in praesenti* to the Sioux City Company, but a grant to the state in trust, the trust to be administered in a particular manner; that the title to the land remained in the state, and was restored and reconveyed to the United States as unearned land, and was at no time vested in the railroad company; that the act of March 3, 1887, was a general one applicable to all grants, but contemplated adjustments only where the grant had vested the title in the railroad company, and not where, as in the act of 1864, the title remained in the state, or where it had reverted to the United States on account of the failure of the railroad company to earn the grant within the stipulated time; that the appellant was not a purchaser in good faith under the act of 1887, or independent of it, and is not entitled to protection as such; that the plaintiff, being only a speculator and purchaser in bad faith, acquired no rights in the land against the defendant's rights as a homestead claimant; that the defendant, having made legal settlement on the land, has done all that he is required to do to perfect his homestead right, and all that he is required to do to protect it.

It is more convenient to first take up the appellee's propositions. The appellant concedes that the act of 1864 was not a grant *in praesenti* to the railroad company; hence we need give that subject no consideration. In view of the conclusion which we reach on other matters presented, we deem it unnecessary to determine whether the land in controversy was subject to adjustment under the act of March 3, 1887. The question was certified to the Supreme Court of the United States in *Knepper v. Sands*, 194 U. S. 476 (24 Sup. Ct. 744, 48 L. Ed. 1083). It was not definitely determined, however,

court saying that its determination was unnecessary. But the court did say that it was "of the opinion that the fourth section of the adjustment act of 1887 had no reference to any unearned land purchased after the date of that act from a company to whom they had never been certified or patented, although, if it had kept its engagement with the state and completed the road in due time, it could have acquired an interest in them."

The controlling question in this case, as we view it, is whether the plaintiff was a purchaser in good faith within the meaning of the adjustment act of March 3,

1887. And, to determine whether he was railroad grant: or was not such a purchaser, it may be well good faith purchaser: to summarize the facts bearing thereon. The evidence: statutes. land was patented to the state in trust for the use and benefit of the railroad company when it should comply with the terms of the grant of 1864. The railroad company by completing five ten-mile sections of the road earned a certain number of acres of land, and the land in controversy was within the limits of the third ten-mile section. The railroad company never completed the entire road, and hence never earned the entire grant. Nor did the state construct the road that had been left unconstructed by the railroad company. Under the terms of the grant, if the road was not completed by the Sioux City Company within ten years from its acceptance of the grant, it had no right to unearned lands, and, if the state failed to secure the completion of the road within five years thereafter, the unearned lands reverted to the United States. The Sioux City Company accepted the grant in September, 1866, and constructed the five ten-mile sections of its road in 1872. It had then earned all of the lands that it ever earned, and soon thereafter it received patents for more land than it had in fact earned. See *Sioux City & St. Paul R. Co. v. United States*, 159 U. S. 349 (16 Sup. Ct. 17, 40 L. Ed. 177).

While the railroad company earned the land in controversy by the completion of its third section of the road, when it accepted other land in place thereof and then failed to complete the road for which the grant was made, it had no right to the land in controversy, nor any equity therein, and it became a part of the unearned lands which reverted to the United States upon the failure of both the railroad company and the state to complete the road. *Sioux City & St. P. R. Co. v. U. S., supra.* The railroad company had no title to the land in controversy when it leased it to Fitzgerald, nor when it contracted to sell it to Ellen M. Childs in September, 1888. The company undoubtedly knew that it had no right to the land in controversy, and hence its acts were clearly not in good faith. When the plaintiff took an assignment of the Childs contract, he knew of the suit that had been brought by the United States to quiet its title to the unearned and unpatented lands, and that the land in controversy was included therein. He is presumed to have known the terms of the grant and the character of the railroad company's title, and he at least legally knew that it had absolutely no title. His agreement of October 8, 1889, with the railroad company furnishes abundant evidence of his complete knowledge of the whole situation. In addition thereto, he knew, in a general way at least, the history of the litigation over these lands, and that the title thereto was unsettled. After the defendant had taken possession of the land in 1890, the plaintiff made no move to regain possession, and, so far as the record shows, made no claim thereto until this action was commenced. From all of these facts and circumstances we think it must be said that the plaintiff was not a purchaser in good faith. Good faith in general means without notice, as well as for a valuable consideration. *Milton v. Boyd, 49 N. J. Eq. 142 (22 Atl. 1078); Tolbert v.*

Horton, 31 Minn. 518 (18 N. W. 647); *Kohl v. Lynn*, 34 Mich. 360.

In *Knepper v. Sands, supra*, it was held that, as the fourth section of the adjustment act of 1887 had no reference to unearned lands purchased after the date of that act, a purchaser thereafter could not become one in good faith within the meaning of the act.

In his reply the appellant says that he does not rely upon any rights under the adjustment act of 1887, except as he relies upon it through an estoppel. But the estoppel relied upon is based on the claim that

2. **EQUITABLE ESTOPPEL.** he was a good-faith purchaser under the act, and, when it is once determined that he did not so purchase, there can be no estoppel. To invoke the doctrine of equitable estoppel, the party claiming thereunder must show that he was himself unaware of the facts and had no convenient and available means of acquiring the knowledge. Where the facts are known to both parties, or where both have the same means of ascertaining the truth, there can be no estoppel. 11 Am. & Eng. Enc. Law (2d Ed.) 434.

The action of the officer of the land department in permitting the plaintiff to press his claim as a contract purchaser, and the subsequent issuance of a patent to

him, does not estop the defendant from questioning the validity of such patent. *Gjerstadengen v. Van Duzen*, 7 N. D. 612 (76 N. W. 233, 66 Am. St. Rep. 679); *Walker v. Ehresman*, 79 Neb. 775 (113 N. W. 218). They were simply mistaken as to both the facts and the law, and the essential elements of an estoppel are lacking. The appellant's

4. **PUBLIC LANDS:** proposition as to the joining of equitable and equitable title: legal titles has no place here, for the reason notice. that the plaintiff had actual notice of a hostile and superior title, and hence never had an equitable title himself.

It is said that the defendant obtained possession of said land by trespass, and because thereof that he can base no homestead rights thereon. If it be conceded that the defendant's original possession of the particular land in controversy in 1890 was obtained by a trespass, it does not follow that he could thereafter obtain no homestead rights. At the time of the trespass, he simply invaded the wrongful possession of another. The land was not then subject to public entry for any purpose. The plaintiff apparently acquiesced in the defendants' possession. He at least made no protest, or claim against the defendant until after he received a patent, and, when the land became subject to public entry, the defendant had been in a peaceable and uninterrupted possession for several years. Under such circumstances, we do not think the rule contended for by the appellant is applicable. That the defendant made his homestead claim in good faith is established by the holding of *Ship Canal, Railway & Iron Co. v. Cunningham*, 155 U. S. 354 (15 Sup. Ct. 103, 39 L. Ed. 183).

A careful examination of every question presented by the appellant and of the entire record leaves no doubt in our minds as to where the equities are. We think the decree of the district court right, and it is therefore affirmed.

LADD, J., taking no part.

H. H. SAWYER v. ANGELO BOTTLI, J. J. ENRIGHT, and
WILLIAM MEYERS, Appellants.

Intoxicating Liquor : WHAT INCLUDED: BEER: STATUTES. The statute prohibiting the selling or keeping for sale of intoxicating liquors, has reference not only to liquor which is in fact intoxicating but also to other described liquors, whether intoxicating or not, such as beer and malt liquor. So that any liquor manufactured from

malted grain by the process of fermentation, no matter how slight and without regard to the amount of alcohol actually contained therein, or whether in fact intoxicating, is within the statutory description of liquors the sale of which is prohibited.

Statutes: ENACTMENT: TITLE: SUBJECT MATTER: DESCRIPTION. The descriptive terms used to describe the subject matter of the various chapters of the code are not to be treated as titles to acts, within the constitutional provision that every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title. But the chapter relating to intoxicating liquor is one of several constituting Title Twelve of the Code, embracing the police powers of the state, and was enacted as one bill in the adoption of the Code, the title of which covered the entire subject matter of all the chapters therein.

Intoxicating liquors: STATUTES. The legislature can not by statute make intoxicating liquor out of a beverage which is not in fact intoxicating, but may extend the prohibition of a statute relating to the sale of liquor to beverages not in fact intoxicating.

Same: INJUNCTION: ATTORNEY'S FEES. Where, as in this action to restrain defendant from selling a malt beverage, defendant stopped the sale but litigated his right to sell, and but for an injunctive decree he might have resumed the sale, the court properly entered a final injunction against him and taxed attorney's fees in plaintiff's favor.

Appeal from Woodbury District Court.—Hon. DAVID MOULD, Judge.

FRIDAY, FEBRUARY 11, 1910.

REHEARING DENIED SATURDAY, MAY 14, 1910.

IN an action to enjoin defendant Botti, as dealer, and defendants Enright and Meyers, as owners of premises on which the business was conducted, from selling, etc., intoxicating liquors on said premises, and maintaining a nuisance thereon, the court entered a decree for plaintiff, from which defendants appeal.—*Affirmed.*

Hubbard & Burgess, for appellants.

John F. Joseph, for appellee.

McCLAIN, J.—It appears that prior to the institution of this action defendant Botti had been engaged in running a fruit and confectionery store on premises belonging to the other defendants, and that in his place of business he had a soda fountain and handled the usual soft drinks. Among the beverages which he thus handled, assuming that its sale was not prohibited by law, was one known as "justus beer." Although the prayer of the petition was in the usual form for an injunction against the illegal sale of intoxicating liquors, the trial court, finding as a fact that after the filing of the petition defendant Botti had ceased to sell or keep for sale any intoxicating liquor on said premises, entered a decree enjoining him from selling or keeping for sale "a certain fermented malt liquor containing alcohol, said liquor being known as 'justus beer,' without having complied with the provisions of the mulct law." The sole question presented for determination, therefore, on the merits of the case is whether the beverage named "justus beer," the methods of manufacture and constituents of which are described in the evidence, is a beverage the sale of which is prohibited by the laws of this state relating to the sale of intoxicating liquors.

The evidence shows that the beverage in question is manufactured by the Sioux City Brewing Company, which is a manufacturer of lager beer and also of various soft drinks;

i. **INTOXICATING LIQUOR:** that in the manufacture of justus beer the same materials are used as in the manufacture of lager beer, and the processes of malting, extracting, etc., are the same, except that fermentation of the mash is not allowed to proceed as far as in the manufacture of lager beer, being stopped by heating before any considerable amount of alcohol is produced, so that justus beer contains not exceeding one-half of one

percent of alcohol by volume, while lager contains about three and one-half percent of alcohol. The evidence also shows that justus beer, as manufactured, is not intoxicating, for the reason that the quantity which an ordinary person could consume at one time would not include enough alcohol to have an intoxicating effect. The argument for appellant is, in brief, that the prohibitory statute has relation to the sale of intoxicating liquors; that the beverage in question is not intoxicating, and that it does not come within the description of "beer," the sale of which is by the statute forbidden. The statute (Code, section 2382) prohibits the selling or keeping for sale, etc., of "any intoxicating liquor, which term shall be construed to mean alcohol, ale, wine, beer, spirituous, vinous, and malt liquor, and all intoxicating liquor whatever," except as otherwise provided. It is apparent, therefore, that the prohibition is twofold: First, of the sale of any liquor which is in fact intoxicating; second, of certain described liquors, whether intoxicating or not. In the second class are enumerated beer and malt liquor, and if the beverage in question is beer or malt liquor, then the fact that it is so manufactured as not to be intoxicating in its ordinary use as a beverage is immaterial. *State v. Cloughly*, 73 Iowa, 626; *State v. Spiers*, 103 Iowa, 711. The name, of course, is not conclusive, for various drinks having names which include the word "beer" are generally recognized as not within the prohibition, for example, root beer and spruce beer. As well said in the cases above cited, if the evidence shows only in general terms the sale of beer without any more specific description, it is open to the defendant to show that the article in question was not beer in the sense in which the term is used in the statute—that is to say, a malt liquor; but we do not think that it was the intention of the court to hold in those cases that if the article is in fact beer—that is, a malt liquor—it is open to the defendant to show that such malt liquor

is in fact not intoxicating. The term "beer" seems to be recognized in the dictionaries as having two meanings: First, a fermented liquor, made from malted grain; and, second, a fermented extract of roots or other parts or products of various plants. See Webster's Dictionary and Century Dictionary, s. v., "beer." By adding the general description "malt liquor," the Legislature clearly designated the sense in which the term "beer" is employed in the statute. With reference to anything called beer which is not made from malted grain, the question will merely be whether or not it is an intoxicating liquor, but if it is made from malted grain—that is, if it is a malted liquor—its sale is prohibited without regard to its quality as an intoxicant. The manufacturer can not bring a malt liquor within the class of liquors not prohibited by the statute by giving it some name other than that of beer, much less can he do so by adding a qualifying descriptive term to the word "beer" used in the name.

We reach the conclusion without the slightest doubt that the beverage in question, being a liquor manufactured from malted grain by a process involving fermentation, no matter how slight the fermentation may be, and irrespective of the amount of alcohol which it actually contains, and also without regard to whether it is in fact intoxicating, is within the statutory description of liquors the sale of which is prohibited. It is conceded that the process of manufacture of justus beer is the same as that of lager beer, save that the fermentation is arrested at an earlier stage, and therefore less alcohol is contained in the product. We think that such liquor is "beer" within the statutory definition, but, whether so or not, it is unquestionably a malt liquor. *State v. O'Connell*, 99 Me. 61 (58 Atl. 59); *Bradshaw v. State*, 76 Ark. 562 (89 S. W. 1051).

Counsel for appellant argue, however, that in the title of the chapter of the Code containing the section

above referred to, and all the other references in the Code to the prohibited sale of liquors, the term "intoxicating liquors" alone is used, and that the prohibition must therefore be limited to liquors which are in fact intoxicating. The short descriptive terms used to describe the subject-matter of the various chapters of the Code are not to be considered as titles to acts within the constitutional provision that "Every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title." Constitution, article 3, section 29. The chapter relating to intoxicating liquors is only one of several chapters constituting together title 12 of the Code, relating to the police power of the state, and title 12, as a whole, was enacted as one bill in the adoption of the present Code. It is not contended that the title of the bill which as adopted constitutes title 12 was not sufficient to cover the entire subject-matter of all the chapters therein.

The Legislature may define a term as it sees fit, and while it can not, of course, by statute make an intoxicating liquor out of a beverage which is not in fact intoxicating, it can extend the prohibition of the statute to beverages which are not in fact intoxicating. *State v. Frederickson*, 101 Me. 37 (63 Atl. 535, 6 L. R. A. (N. S.) 186, 115 Am. St. Rep. 295).

Having prohibited the sale of beer and malt liquor, it becomes wholly immaterial whether the particular liquor in question, coming within the description of these terms, is an intoxicating liquor in fact, and we need not therefore refer further to the point, strongly pressed in argument, that other beverages which are not malt liquor, and are not beer within the meaning of the terms as used in the statute, in fact contain alcohol in even greater proportionate quantities than were found

2. STATUTES:
enactment:
title: subject
matter:
description.

3. INTOXICATING
LIQUORS:
statutes.

by analysis in the samples of justus beer described by the expert witnesses.

Although defendant Botti ceased to sell justus beer after this action was instituted, he litigated the question whether he had not a right to do so, and if the court had

4. **SAME:** injunction: attorney's fees. entered no decree of perpetual injunction against him, he could have resumed the sale so far as this action was concerned without restraint. Therefore, the court properly entered a decree of final injunction, and, as an incident, taxed an attorney's fee to him in favor of the plaintiff. *Donnelly v. Smith*, 128 Iowa, 257; *Drummond v. Richland City Drug Co.*, 133 Iowa, 266; *Hammond v. King*, 137 Iowa, 548.

The decree of the trial court is *affirmed*.

A. H. RISHER and CYNTHIA RISHER v. THE ACKEN COAL COMPANY ET AL., Appellants.

Nuisance: PERMANENT AND CONTINUING INJURY: RECOVERY OF DAMAGES: ELECTION. In an action for damages growing out of a permanent nuisance the plaintiff may elect whether he will treat the injury as permanent and recover all his damages in one action, or as continuing and recover therefor in successive actions; but where he has treated the injury as permanent and has recovered his entire damages he can not thereafter maintain an action for continuing injury.

Same: MEASURE OF DAMAGES. Where a nuisance and consequent injury are distinctly permanent in character the measure of recovery is the decrease in the value of the injured property on account of the nuisance.

Same: CONTRIBUTORY NEGLIGENCE. The doctrine of contributory negligence is not applicable to nuisance cases, as the nuisance itself is not necessarily occasioned by negligence. In this action the nuisance complained of was a dirt dump from a coal mine far removed from plaintiff's property at the time he purchased, but was subsequently carried by defendant to within a short distance of his property which made it in fact a nuisance.

Same: EVIDENCE. Evidence in this action that plaintiff had consented
4 to the use of other ground for a dump was not prejudicial to defendant, since, if untrue, he might have shown that fact.

Same: DAMAGES: INSTRUCTION. Evidence of difference in the rental
5 value of plaintiff's premises because of the nuisance is held not to have been prejudicial, in view of the court's instruction that the decrease in the value of plaintiff's property was the measure of recovery, which excluded the question of rental value.

Appeal from Appanoose District Court.—Hon. D. M. ANDERSON, Judge.

FRIDAY, FEBRUARY 11, 1910.

REHEARING DENIED SATURDAY, MAY 14, 1910.

ACTION to recover damages for a nuisance. There was a trial to a jury, and a verdict and judgment for the plaintiffs. The defendants appeal.—*Affirmed.*

Wilson & Smith, for appellants.

Howell & Elgin, for appellees.

SHERWIN, J.—This is an action to recover damages alleged to have been suffered by the defendant's extension of what in mining parlance is known as a "dirt dump." The plaintiffs have occupied their present home for fifteen years or more, and the defendants have been operating a coal mine near thereto for eight or nine years. When the defendants began operating their mine, there was a dirt dump of which the present one is an extension. There is no doubt but what it has grown to be a nuisance if it was not originally one, and that the plaintiffs are entitled to recover damages on account thereof.

The defendants present two propositions upon which they chiefly rely for a reversal. They contend that the

nuisance was not permanent, and, because thereof, that the wrong measure of damages was submitted to the jury, and, second, that they should have been permitted to show contributory negligence on the part of the plaintiffs. Neither of the propositions can be sustained. The dump in question was a large one. Its exact length does not appear, but it does appear incidentally that it was at least two hundred and fifty or three hundred feet long, and it is clearly shown that it was one hundred feet wide at the base, and from fifty to sixty feet high. It is undoubtedly a permanent pile and could be so treated by the plaintiffs in asking for damages. We have heretofore held that the plaintiff may elect whether he will treat the injury as permanent or continuing, and that the defendant may not complain of such election. *Hollenbeck v. City of Marion*, 116 Iowa, 69. Of course, where the injury is treated as permanent and damages are asked once for all, no suit could afterwards be maintained for a continuing injury.

The nuisance in question and the injury are distinctly permanent in their character, and under the rule of our cases the measure of the plaintiffs' recovery is the decrease in the value of their home on account of the nuisance. *Harvey v. Railroad Co.*, 129 Iowa, 465, and cases therein cited. The appellants rely upon *Hollenbeck v. City of Marion*, *supra*; *Shirely v. Ry. Co.*, 74 Iowa, 169, and *McGill v. Pintsch Com. Co.*, 140 Iowa, 429, as sustaining their contention that the nuisance is not permanent in its character. But those cases are not controlling because of the difference in the facts.

It is claimed that the plaintiffs are to be charged with contributory negligence because they bought and improved their property after a "dirt dump" had been started in connection with the mine now operated by the defendants. The principle involved was fully discussed in *Bowman v. Humphrey*, 132 Iowa, 234, and we there decided that

the doctrine of contributory negligence is not applicable to nuisance cases, because the nuisance itself is not necessarily occasioned by negligence. Moreover, in this case a jury would not be justified in finding contributory negligence from the facts. When the plaintiffs bought, the dump was far removed from their premises and not obnoxious. The defendants have carried it to within a short distance of their home and made it in fact a nuisance.

Sidney Green was used as a witness by the plaintiffs, and was permitted to testify in substance that he had given his consent to the use of other ground for a dump. There was no prejudicial error in the testimony, because if untrue the defendants might have so shown.

There seems to have been some uncertainty on the trial as to the true measure of the plaintiffs' damages, and some testimony was received showing difference in the rental value of the premises. But this could not have prejudiced the defendants because the court instructed that the decrease in the value of the property was the measure of recovery, and thus excluded the questions of rental value.

Complaint is made of other rulings on the introduction of testimony, but the matters discussed are of minor importance and do not merit discussion here.

The plaintiffs filed a motion to strike the appellants' argument because not in compliance with our rules. The rule was not well observed, but the departure therefrom is not serious enough to demand drastic punishment. Neither party strictly complied with the rules in preparing the case for submission to us, but we let the matter pass, with hope for the future.

The judgment should be, and it is, *affirmed*.

MARY LONGSHORE v. CHICAGO GREAT WESTERN RAILWAY
COMPANY ET AL., Appellants.

Railroads: UNDERTRACK CROSSINGS: CONTRACT: EVIDENCE. In this
1 action to enjoin the defendant railway company from closing an
undertrack crossing on plaintiff's land, the evidence is reviewed and
held sufficient to show that at the time of the conveyance of the
right of way a written agreement was entered into between
plaintiff and defendant's predecessor, by which plaintiff was to have
the undertrack crossing in question as well as a surface crossing
at another point, which were to be in part consideration for
the right of way granted.

Same: EXISTING CROSSINGS: NOTICE TO SUBSEQUENT PURCHASER. The
2 fact that right of way fences were built in and attached to a
span of a railroad bridge forming a fenced passage under the
track, was sufficient to put a purchaser of the road on inquiry
as to whether there was an agreement between its predecessor
and the land owner for an undertrack crossing at that place.

*Appeal from Madison District Court.—Hon. J. H.
APPLEGATE, Judge.*

TUESDAY, FEBRUARY 15, 1910.

REHEARING DENIED SATURDAY, MAY 14, 1910.

ACTION to enjoin the defendants from closing an
undertrack crossing on the plaintiff's land. Judgment for
the plaintiff. The defendants appeal.—*Affirmed.*

Carr, Carr & Evans and John A. Guiher, for appellants.

Wilkinson & Wilkinson and W. S. Cooper, for appellee.

SHERWIN, J.—In 1887 the plaintiff and her husband conveyed to the Chicago, St. Paul & Kansas City Railway Company for a right of way a strip of ground one hundred feet in width across the plaintiff's farm. The deed was without reservation or condition. Clanton Creek crosses plaintiff's land east and west just south of the defendant's right of way. Just south of plaintiff's house a draw from the north extended to Clanton Creek, and at the time the defendant's road was constructed there was a wagon road down this draw to a ford at the creek. It was not a public highway, but a road that was used by the public, and by the plaintiff in reaching the creek and the south part of her farm. The construction of the defendant's road required a fill across the plaintiff's land. At the east side of the farm it was four or five feet high, and at the west side something less. The track crossed the draw of which we have spoken at an elevation of about ten feet. This draw was bridged when the defendant's road was built, the bridge consisting of three spans, each about twelve feet wide and seven or eight feet high. From the time of the construction of the road in 1887 until this action was commenced the plaintiff used the west span of said bridge as an undertrack crossing. In 1908 the defendant began the construction over this draw of a cement culvert or bridge, with an opening four by five feet, and threatened to fill the balance of the opening under the old bridge. Thereupon this action was brought to enjoin the defendant from destroying the plaintiff's undertrack crossing.

The plaintiff pleaded, and now relies upon a written agreement between herself and the original company by

i. RAILROADS:
undertrack
crossings:
contract:
evidence.

the terms of which she was to have the undertrack crossing in question and a surface crossing west thereof as a part of the consideration for the right of way granted.

The evidence is overwhelming that both of these crossings

were agreed upon by the plaintiff and the representative of the railroad company. The doubtful question, if there be one, is whether there was an independent written agreement therefor executed at the time of the conveyance. No such agreement was produced on the trial, and the plaintiff relies upon the testimony of witnesses who claim to have been present at the time it was executed. There is sufficient foundation for secondary evidence; and, if the plaintiff's witnesses are entitled to credit, there was a written agreement for this undertrack crossing. Mr. Clark, the right of way agent who conducted the negotiations and procured the conveyance for the railroad company, testifies that, if any agreement had been made for an undertrack crossing, it would have been in writing. His testimony tends to contradict the plaintiff and her witnesses as to the execution of such a writing, but the most that he can say about it is that he did not usually make such contracts, and that he has no recollection of making one with the plaintiff. The plaintiff herself, while testifying that such an agreement was made, thought that it was embodied in the deed, and because of her testimony the defendant says she should have no relief. The plaintiff was past seventy years of age when she testified. The business was transacted more than twenty years before, and was conducted by her husband, so it is not strange that she was not certain as to the details of it. She testified that Mr. Clark read such an agreement to her, or in her presence, and as it was not written in the deed, it must have been an independent writing, as other witnesses testify. Fraud on the part of Mr. Clark will not be presumed.

The appellants contend that the evidence is not clear and satisfactory as to the terms of the lost writing. The evidence is clear and explicit as to the agreement for the two crossings, and the witnesses say that such agreement was put in writing and signed. It was not, and could

not be, a complicated agreement. The essence and substance of it was that there should be an undertrack and a surface crossing, and we think the evidence clearly shows that it was so written.

In 1893 the Chicago, Great Western Railway Company became the owner of the road by purchase, and it is urged that it had no notice of the plaintiff's right to the under crossing. The evidence shows that the right of way fences were swung in and attached to the ends of the bridge, and that there was a traveled way under the bridge when the defendant purchased. In other words, there were all of the *indicia* of an under crossing, and enough to put the purchaser upon inquiry. *Swan v. Ry. Co.*, 72 Iowa, 650; *Rock Island & P. Ry. Co. v. Dimick*, 144 Ill. 628 (32 N. E. 291, 19 L. R. A. 105); *McCann v. Day*, 57 Ill. 101.

The judgment is right and it is therefore *affirmed*.

B. A. DOLAN, Appellee, v. JOHN SAMMONS and TABER LUMBER COMPANY, Garnishee, Appellants.

Garnishment: ANSWER OF GARNISHEE: BILL OF EXCEPTIONS: EXEMPTIONS: BURDEN OF PROOF. The answers of a garnishee to interrogatories are not matters of pleading but of evidence, and must be made of record by a bill of exceptions to be considered on appeal. And where it is claimed that the property garnished is exempt the burden is upon the party claiming the exemption to establish the same.

Appeal: ABSTRACT: CONCLUSIVENESS. Where no transcript was filed in support of appellant's claim that there was evidence that funds garnished were exempt, and no such evidence appeared in the record, the appellee's amended abstract asserting that there was no such evidence will be taken as true.

Appeal from Lee District Court.—Hon. H. BANK, Judge.

TUESDAY, FEBRUARY 15, 1910.

REHEARING DENIED SATURDAY, MAY 14, 1910.

GARNISHMENT proceedings to subject an amount due from Taber Lumber Company to defendant Sammons to the payment of a judgment held by plaintiff against said Sammons. Both defendant and the garnishee claimed that the debt was exempt from execution. The trial court denied the exemption, and the garnishee and the defendant appeal.—*Affirmed.*

F. T. Hughes and E. L. McCoid, for appellants.

A. L. Parsons and B. A. Dolan, for appellee.

DEEMER, C. J.—These two cases have a very unusual history. The amount involved is very small, yet this is the third time the case has been before us. See 139 Iowa, 64, and 119 N. W. 690, for opinions in former appeals. Each time the case has come here the record has been obscure, and the situation difficult to understand. This time there are numerous amendments to abstracts, motions, and additional arguments, tending to obscure rather than to clarify, and we shall have much difficulty in stating the case. Before going to the exact point involved, it is well to say that none of the motions filed by the parties are regarded as well founded, and they are each and all overruled. According to appellant's contention, plaintiff recovered a judgment before a justice of the peace against the defendant Sammons for the sum of \$40, with interest from October 13, 1895, and costs of suit. This judgment was transcribed to the district court some time prior to November 17, 1906. On November 25, 1905, execution issued on the justice's judgment, and this was served on the same day by garnishing

the appellant Taber Lumber Company. The lumber company was directed "not to hold the weekly wages which it was paying the defendant in execution each week." It is claimed that the garnishee answered as follows: "The Taber Lumber Company owes the defendant \$47, which is in our possession; do not know of any other debts due the defendant. The money due from Taber Lumber Company to defendant was earned under a written contract, which as Exhibit A, is as follows: 'At the end of the milling season the Taber Lumber Company agrees to pay to the undersigned a bonus of ten percent on his earnings during the sawing season; but it is understood and agreed that if the undersigned is discharged or quits the employ of Taber Lumber Company before the end of the sawing season, then all claims to this bonus is forfeited. I agree to work for the Taber Lumber Co. for the season of 1905. John Sammons.' The defendant commenced work at the commencement of the sawing season of 1905 for the Taber Lumber Company, and continued to work thereunder until the end of the said season, which season terminated on November 25, 1905, on which day the garnishment was served."

Defendant Sammons also appeared, and among other things pleaded that he was a resident of the state, the head of a family, and that the indebtedness of the Taber Lumber Company to him was his personal earnings for ninety days next preceding the levy of the execution, and therefore exempt. Plaintiff's reply admitted that the amount owing was \$47, but denied that this was for personal earnings within ninety days. On these issues the justice discharged the garnishee, and appeal was taken to the district court, where the action of the justice was affirmed. Appeal was taken to this court, where the judgment was reversed. See opinion in 139 Iowa, 64. Upon remand the case was again tried in the district court, where a judgment was entered on April 3, 1909, holding that the

funds were not exempt, and ordering the amount due subjected to the plaintiff's judgment. Defendant Sammons was granted ten days within which to file a motion for a new trial. This motion was filed April 8th. On April 10th the trial judge filed a certificate of appeal to this court, and by agreement of parties it was signed by the judge as of the last day of the March term. On June 1, 1909, and during the May term, defendant's motion for a new trial was overruled, and the trial judge thereupon certified that the cause was one in which an appeal should be allowed. The appeal was taken June 14, 1909. It also appears that plaintiff sued out an execution on the judgment, which had been transcribed to the district court on November 7, 1906, and that this execution was served on the same day by garnishing the Taber Lumber Company. In the notice of garnishment the garnishee was directed not to hold the weekly wages of the defendant Sammons. It is claimed that on March 12, 1907, the garnishee answered that it owed the defendant \$46.91, which was then in its possession, and that the money was due, earned under the following contract: "At the end of the milling season the Taber Lumber Company agrees to pay the undersigned a bonus of ten percent on his earnings during the sawing season, but it is understood and agreed that if the undersigned is discharged or quits the employ of the Taber Lumber Company before the end of the sawing season, then all claims to this bonus is forfeited. I hereby agree to work for the Taber Lumber Company for the season of 1906. [Signed] John Sammons." It also pleaded that: "The defendant commenced work at the beginning of the sawing season of 1906 for the said Taber Lumber Company, and continued to work thereunder until the end of said season, which terminated on November 17, 1906, on which day the garnishment was served."

On April 8, 1909, defendant Sammons filed an an-

swer pleading the prior garnishment proceedings in abatement. Prior to that, and on March 8, 1909, the defendant had appeared and filed an answer or pleading, in which he alleged that he was a resident of the state, the head of a family, and that the amount due him from the garnishee was for his personal services earned within ninety days, and therefore exempt. On April 3, 1901, the case on the issues then joined was tried to the court, resulting in a finding that the wages were not exempt, and ordering that they be subjected to the payment of plaintiff's judgment. Defendant excepted, and was given ten days within which to file a motion for a new trial. On April 10th there was filed a certificate allowing an appeal, which recites that it was signed during the term and by consent of parties as of the last day of the term. On April 6th defendant filed his motion for a new trial, which set forth the prior garnishment proceedings, the fact that the earnings were exempt from execution, and that nothing was due the defendant from the lumber company until the day the garnishment was served. This motion was heard at the June term of court, and was overruled; the trial court at the time certifying that the case was one in which an appeal should be allowed. On June 14th defendant Sammons appealed to this court.

Appellee says that no testimony was offered by appellant in the court below, and he also denied that appellant Sammons filed any pleading in the first garnishment proceedings, although he admits that in the motion for a new trial the question of the exemption of the fund was raised. Appellee also denies that the garnishee pleaded any exemption in the second garnishment proceeding, and says the only answer made by it was as follows: "We have down there belonging to the defendant \$93.91, \$47 of this sum was earned in 1905 and \$46.91 in 1906." He further says: "Appellant on November 30, 1906, filed his motion in (case No.) 1,348 to quash the execution levied

by garnishment on Taber Lumber Company November 17, 1906, and discharge the garnishee, and among other things alleged that the judgment is void; that the funds in the hands of garnishee is exempt as personal earnings earned within ninety days, he being the head of a family and a resident of the state. On January 7, 1908, appellant dismissed this motion, and an order of dismissal entered that day."

In another amended abstract appellee denied that any part of the answer of the garnishee in the first garnishment proceeding was made of record. Appellee further says that the only testimony in the court below was that of Dolan, to the effect that Sammons had done no work for the lumber company for months prior to March, 1909. In view of this issue made by the abstract appellants have had certified to this court a transcript of the record showing the answers of the garnishee, and from this we extract the following:

"Interrogatory 1: Are you in any manner indebted to the defendant in this suit, or do you owe him money or property which is not yet due? If so, state the particulars. Answer: Yes, sir; we have an amount down there that is due him. The amount is \$46.91, which he earned in 1906.

"Interrogatory 2: Have you in your possession or under your control any property, rights, or credits of said defendant. If so, what is the value of the same? State particulars. Answer: On November 17, 1906, we had in our possession \$93.91.

"Interrogatory 3: Do you know of any debts owing to said defendant, whether due or not due, or any property rights or credits belonging to him, and now in the possession or under the control of others? If so, state the particulars. Answer: None whatever."

These were the answers taken by a commissioner appointed by the district court, and filed March 12, 1907,

and are the only ones which are supported by any transcript of the record. Aside from being filed, they do not seem to have been made of record in the case, and they do not show any exemption, or claim of exemption. True, Sammons made such claim, but no testimony

1. GARNISHMENT:
answers of garnishee; bill of exceptions; exemptions; burden of proof.

has been certified to this court showing that any testimony was taken in support of the exemption. Under the rule announced in *Brainard v. Simmons*, 58 Iowa, 464, these answers were no part of record, and can not be considered on this appeal. Moreover, the answers themselves, even if considered by us, do not show that the funds in the hands of the garnishee were exempt from execution, and there is no testimony in the record to show any such exemption. The burden was upon the defendants to show this exemption, and that they have not done. These answers were not pleadings, but evidence, which should have been made of record by proper bill of exceptions.

In view of this record the appeal in the second case does not involve any question of exemption; and, save for a matter which we shall presently note, the judgment in

2. APPEAL:
abstract; conclusiveness.

that case should be affirmed. Appellee denied that any evidence was taken in the first case, and denies that any such answers were made by the garnishee as are hereinbefore set out. He also denied that Sammons filed any pleading in that case. In another paper filed he admits, however, that the defendant Sammons claimed the funds as exempt, and that the plaintiff denied the exemption, but he still insisted that no testimony was taken. As no transcript has been filed in support of appellants' claim, we must take appellee's statement for the matter, and hold that, as there is no testimony in the record showing an exemption of the fund garnished in the first case, the judgment in that case must be affirmed.

The cases were tried together, and the only record

which we may consider at all shows that the \$47 owing Sammons for the year 1905 was properly subjected to the payment of plaintiff's judgment.

There remains but one other question, and that was raised by defendant Sammons in his answer filed in the second case. In one paragraph of that answer he pleaded the suing out of the first execution, and the garnishment proceedings thereunder, and further averred: "But the cause was then pending in said justice court, and that the said Taber Lumber Company was and is absolutely solvent and able to pay the said sum of \$47 in case the court shall so order, and that by said execution from said justice of the peace the plaintiff, Dolan, had levied upon, and was proceeding to collect, sufficient in amount of money to pay off and fully satisfy said judgment, interest, and costs, and therefore the execution herein could not be levied, and the garnishment proceedings herein were premature and should now abate." This same question was also made in his motion for a new trial. As the cases were tried together, and it appeared that the judgment and execution were for \$64, with \$4.20 costs, and that the amount in the hands of the garnishee was but \$47, it is manifest that this defense was not established. No question is made regarding plaintiff's right to sue out a second execution while the first one was outstanding and no reliance whatever is placed upon section 3955 of the Code; hence we do not consider the applicability thereof to these proceedings.

The record is in a very confused state. We have done our best to unravel it, and to apply the statutes and rules of this court applicable thereto. The result is that we can find no tenable ground upon which to disturb the orders and judgments of the trial court. It is to be hoped that this will be the end of some most unprofitable litigation.

The orders and judgments in each case must be, and they are, *affirmed*.

T. O. KINMAN v. JOHN W. BOTTS and MARY BOTTS,
Appellants.

Specific performance: EVIDENCE. To support a decree of specific performance of an alleged contract to convey land, the evidence of a binding contract must be clear and satisfactory. In the instant case the evidence is reviewed and held insufficient to establish an enforceable contract.

Appeal from Davis District Court.—HON. M. A. ROBERTS,
Judge.

TUESDAY, FEBRUARY 15, 1910.

REHEARING DENIED SATURDAY, MAY 14, 1910.

ACTION for specific performance of an alleged contract to convey land. There was a decree for the plaintiff, and defendants appeal.—*Reversed*.

T. P. Bence and John F. Scarborough, for appellants.

Taylor & Ramseyer, for appellee.

McCLAIN, J.—There is no evidence that possession of the land to which this action relates was ever delivered to plaintiff, or that any payment of purchase price was ever made, and it was necessary, therefore, that the contract be established as a contract in writing. There were preliminary negotiations between John W. Botts, who was the sole vendor, and will be referred to hereafter as defendant, and one Leach, a real estate agent, during which Leach sought to secure from defendant a price on

defendant's farm situated in this state, such as would enable Leach to effect a sale thereof to an undisclosed prospective purchaser. Defendant was a resident of Colorado when these negotiations were commenced, and remained a resident throughout the negotiations, although he expressed an intention to return to Iowa before the sale, if one should be made, was finally consummated. As will hereafter appear, there is great uncertainty under the evidence of Leach himself testifying as a witness whether he was acting as agent of defendant or of plaintiff or of both parties, but it is plain that neither plaintiff nor defendant understood that Leach was authorized to act as agent for both of them. The correspondence between Leach and defendant was solely as to the price which defendant would take for his farm, and no terms of sale other than as to the price were specifically referred to, although Leach advised defendant that the farm had depreciated during his absence from it in that the improvements had been allowed to become in bad condition; this suggestion being made by Leach as a reason why the farm was worth less than defendant supposed it to be worth in view of his previous knowledge of its condition. Leach had indicated that the prospective purchaser would pay \$9,600, and defendant had at first fixed his price as \$10,000. There had been some suggestion from defendant that he would split the difference and pay \$50 commission and furnish an abstract. Thereupon Leach telegraphed defendant: "Will you accept ninety-six fifty net? No commission or abstract. Wire our expense." With reference to the use of the word "our" in this telegram, it is proper to state as bearing upon its interpretation that Leach had a partner in the real estate business, and that he seems to have spoken of himself and partner jointly in the transaction, so that the expression "our expense" in the telegram does not necessarily refer to the expense of himself and the proposed purchaser. To this telegram

defendant responded by wire: "Yes. Will accept as per your wire date." Now, the sole question to be determined in this case is whether these telegrams concluded a binding contract of sale in view of the circumstances so far as they were known to both parties, between plaintiff, the undisclosed prospective purchaser, and defendant.

It is a matter of common knowledge that executory contracts for the sale of real property usually contain terms as to the time of payment of the consideration in a lump sum or by installments, the time of surrender of possession, the payment of the expense of furnishing an abstract, and similar matters. While it is true that an unequivocal present agreement of sale of specific property for a definite price would be valid without statement as to other conditions, all of which would in such event be determined by recognized rules of law, nevertheless we think the universally known usage to state such terms in a written contract may be taken into account where the language of the writings relied upon to constitute a contract leaves room for doubt as to whether the parties intended and understood that such writings should constitute a complete and binding contract of sale. Conceding for the present that Leach was acting as agent for an undisclosed principal and not as defendant's agent, it is still a matter of doubt in our minds whether the telegrams above set out amounted to more than an inquiry whether it would be worth while for the prospective purchaser to propose a definite contract of sale on the basis of a consideration of \$9,650, and whether defendant did more than to express his willingness to enter into negotiations on that basis. It is to be noticed that defendant did not say simply, "Yes," or "Proposition accepted," but used the words "Will accept," which at least suggest an understanding on his part that a contract with that consideration stated in it would in that respect be satisfactory. The conduct of plaintiff on the receipt of de-

fendant's telegram by Leach strongly corroborates this view, for plaintiff immediately authorized the drawing of a formal written contract of sale containing such provisions as are usually put in such contracts, affixed his own signature thereto, and directed such contract to be forwarded by registered mail to the defendant with a slip of paper attached bearing the words "Sign and return." Accompanying this deed was a letter from Leach to defendant explaining that plaintiff was to pay in fact \$9,800, of which amount \$150 was to be retained by Leach as his commission, and an order on the bank for the payment of that amount out of the entire purchase price to Leach and his partner was inclosed for defendant's signature with a slip of paper attached asking that it also be signed and returned. It is no more than fair to plaintiff's counsel to say in this connection that plaintiff in his testimony does not admit that he directed Leach and his partner to make out this contract and forward it, and he seems to deny the affixing of his signature. But, if Leach was plaintiff's agent, then the acts of Leach and his partner were the acts of plaintiff, and are to be taken into account in determining the intention with which the telegrams were exchanged to the same effect as though they were the acts and conduct of plaintiff himself. If Leach was defendant's agent, then no binding contract was made by the exchange of telegrams, and no other written contract is relied upon. If Leach was attempting to act as agent for both parties, it was without the knowledge of either, and neither party would be bound.

On receipt of the contract in duplicate, defendant at once refused to execute it, not only on the ground that Leach had deceived him into believing that the price named was the highest price that could be secured from the prospective purchaser, and that Leach was attempting to get a commission of \$150 without defendant's being consulted in that matter, but also on other grounds relating to the

terms of the sale as to insurance and time of payment. We think it extremely doubtful to say the least whether it was understood on either side that the telegrams concluded a binding and final contract of sale. In an equitable action for specific performance relief should not be granted unless a case is made out by clear and satisfactory evidence, and we reach the conclusion that the evidence in this respect was so far from satisfactory that plaintiff's petition should be dismissed.

A motion submitted with the case to strike parts of appellee's reply is overruled.

The decree is reversed, and the case is remanded to the lower court for a decree dismissing plaintiff's petition; or, at defendant's election, he may have such a decree in this court.—*Reversed.*

J. E. DAVIS, Appellant, v. JOHN LAUGHLIN ET AL., Appellees.

Appeal: JURISDICTION: AMOUNT IN CONTROVERSY. To authorize an appeal from the district court without a certificate the amount in controversy must exceed one hundred dollars, but the amount in controversy is to be determined from the pleadings including counterclaims. In this action to enjoin defendant township trustees from paying out township money, and to compel them to replace money already expended, the amount involved as shown by the pleadings is held sufficient to confer jurisdiction on appeal without a certificate.

Townships: EMPLOYMENT OF COUNSEL BY TRUSTEES: COMPENSATION: STATUTES. There is no express statutory authority for township trustees to pay out township funds for attorney's fees in defense of an action to enjoin the work of draining a highway and otherwise improving the same. Nor have they implied authority to employ attorneys in such cases and to pay for their services from the general fund, or to levy a tax to meet such expenses. As there is a statute for the payment of attorney's fees in certain actions against township trustees and authorizing the levy of a tax to meet the same, the rule obtains that in cases not enumerated in the statute the trustees have no such authority.

Appeal from Mahaska District Court.—Hon. K. E. WILCOCKSON, Judge.

THURSDAY, FEBRUARY 17, 1910.

REHEARING DENIED SATURDAY, MAY 14, 1910.

ACTION to compel defendants, who are township trustees, to replace certain money taken by them out of the township funds; for an injunction to restrain them from making future withdrawals; for a writ of mandamus to compel them to return the funds already taken; and for other equitable relief. Defendants denied the allegations of the petition, and pleaded a counterclaim for damages on an injunction bond. The trial court found for plaintiff as to one item amounting to \$22.50 and denied any other relief. It also dismissed defendants' counterclaim. Plaintiff appeals.—*Reversed and remanded.*

J. O. Malcolm and D. C. Waggoner, for appellant.

J. C. Williams and Lacey & Lacey, for appellees.

DEEMER, C. J.—I. The items paid out by defendants as township trustees, of which plaintiff complains and which were not allowed by the trial court, are as follows:

Costs paid in case brought by plaintiff against the defendants	\$6.30
For making survey in said case.	4.00
Attorney's fees and expenses paid to J. C. Williams and J. F. Lacey in said case.	92.00

Defendants say, however, that according to the record and the testimony adduced but \$97.30 is involved, and that the appeal should be dismissed because less than

\$100 is involved, and the trial court did not give a certificate of appeal. They base their claim upon section 4110 of the Code, which provides, in substance, that no appeal shall be taken when the amount in controversy does not exceed \$100 unless the trial court give a certificate allowing the appeal. The amount in controversy is to be determined from the pleadings including the counterclaims. *Hancock v. Hancock*, 134 Iowa, 475; *Wald v. Wald*, 124 Iowa, 183; *Schultz v. Ford Bros.*, 133 Iowa, 402. Defendants in their counterclaim, asked judgment for \$100, and this added to plaintiff's makes more than \$100. Moreover the action is in equity, and plaintiff asked an order enjoining defendants from paying out any more money from the township treasury. We are constrained to hold that we have jurisdiction of the appeal. See, as sustaining this view, *Dist. Tp. v. Independent Dist.*, 72 Iowa, 687; *Miles v. Tomlinson*, 110 Iowa, 322.

II. It appears from the record that during the year 1907 defendants Laughlin, Odem, and Moran were trustees of a certain township in Mahaska County, Iowa, and

that during the same years defendant McCrea was clerk. Plaintiff is a resident landowner and taxpayer in said township. In the year 1907 plaintiff's wife brought action against the defendant trustees and a road supervisor to enjoin them from cutting and digging ditches along a highway near her land, in which she claimed that they had directed the road supervisors to do the work without authority of law and to their injury. It also appears that during the same year one Geo. Davis brought action against the same defendants to enjoin them from filling or destroying a sub or runway for his (plaintiff's) stock, and from tearing out fences designed to protect said subway across and under the highway. It was charged that defendants, as trustees, advised and directed the road super-

1. APPEAL:
jurisdiction:
amount in
controversy.

2. TOWNSHIPS:
employment
of counsel
by trustees:
compensation:
statutes.

visor to do the work complained of. The township trustees employed J. C. Williams and J. F. Lacey to defend these suits, and they appeared and made defense thereto. They also paid \$6.30 as court expenses, and also paid \$4 for having a survey made of the road involved in the *Laura Davis* case. They also paid their attorneys \$20 in the *Laura Davis* case, and in the other case they paid Lacey \$30 as attorney's fees, and Williams \$37 as attorney's fees and expenses, and it is claimed that since then warrants for the sum of \$50 have been issued to Williams & Lacey for attorney's fees. The injunction in the *Laura Davis* case was dissolved and the petition in the *Geo. Davis* case was dismissed. The latter case came to this court, and the opinion filed therein will be found in 139 Iowa, 186. Upon this state of facts plaintiff contends that defendants had no authority to pay costs or attorney's fees out of the township funds, and that defendants should be ordered to return the amount paid out by them to the township treasury and enjoined from making any further payments. One or more items which the court found were illegally paid we shall not consider on this appeal.

The broad claim is made that the township trustees have and had no authority to pay attorney's fees or the costs incurred in the suit brought against them as such trustees out of the township funds; and this is the only question in the case. It is true, of course, that a township is not a body corporate, and that it can not sue or be sued. *Hanson v. Cresco*, 132 Iowa, 540. But its officers are required by law to perform certain duties which are conferred upon them by statute. They are also given power to certify or levy taxes for certain specified purposes. The material statutes read as follows:

Sec. 574. The township trustees are the overseers of the poor, fence viewers, and the township board of equal-
VOL. 147 IA.—31.

ization, and board of health, and shall have charge of all cemeteries within the limit of their townships dedicated to public use, when the same are not controlled by other trustees or incorporated bodies.

Sec. 575. Any person elected to a township office, and refusing to qualify and serve, shall forfeit the sum of five dollars, which may be recovered by action in the name of the county for the use of the school fund in the county, but no person shall be compelled to serve as a township officer two terms in succession.

Sec. 563. County treasurers are hereby authorized to pay over to the city or town treasurers which come under the provisions of the three preceding sections all moneys collected for the road fund, or other funds which would otherwise be paid over to the township clerks of such townships.

Sec. 564. Whenever litigation shall arise, involving the right or duty of township trustees to certify or levy taxes which have been authorized upon expressed conditions, then in such cases, if the trustees are made parties to said litigation, they shall have authority to employ attorneys in behalf of said township, and are further authorized to levy the necessary tax to pay for said legal services, and to defray the unavoidable expenses of said litigation.

They are also authorized to submit the question of building a public hall and to levy a tax for the purpose (Code, sections 567, 568); to condemn lands for cemeteries and to levy taxes therefor (Code, sections 585, 586); to contract and levy taxes for use of public library (Code Supp. 1907, section 592a); and in addition thereto they are directed by law to meet on the first Monday in April of each year to determine: "(1) The rate of property tax to be levied for the succeeding year for roads, bridges, guideboards, plows, scrapers, tools and machinery adapted to the construction and repair of roads and for the payment of any indebtedness previously incurred for road purposes. (2) To certify to the board of supervisors the desire for an additional road tax," etc. Code Supp. 1907, section 1528.

They are also to set apart such portion of their taxes as may be necessary for the purpose of purchasing tools and machinery and paying for guide boards, and the same shall constitute a general township fund. Code, section 1529. These are the only provisions of statute applicable to the case; and the only one relating to attorney's fees is section 564, which manifestly does not apply.

It is argued, however, that defendants had implied authority to employ attorneys when sued as they were here, and that, having a general fund as provided by section 1529, they were authorized to use it in paying the expenses of the litigation. This general fund is a road fund, and it is expressly provided in section 1533 of the Code Supplement of 1907 and section 1549 of the Code that both property and poll road taxes shall be equitably and judiciously expended for road purposes. As there is a statute for the payment of attorney's fees in certain actions against trustees and authorizing the levy of a tax to meet these payments, the ordinary rule of construction must obtain to the effect that in no other case may attorneys be employed and taxes levied for the payment of their fees. The old maxim "*expressio unius, exclusio alterius*" applies. The so-called general fund created by sections 1528 and 1529 can be expended for road purposes only. It may be inconvenient for one who is required to serve as an official, or pay a fine, to recompense an attorney out of his own pocket when sued in a given kind of case; but there is nothing in the law which requires him to make defense to such actions as were here commenced. If he were simply following the law, no liability could be imposed upon him. On the other hand, if he were acting outside the scope of his official powers he would be liable personally and be compelled to pay his attorney as in any other case. It is certainly true that the taxpayers' money can not be taken without authority to pay attorney's fees or costs. Although there be a fund

in the township treasury, if that fund is raised for special and specific purposes, it can not be diverted. If there be no authority in law for levying a tax to meet such expenses, and no fund with which to pay them, a taxpayer may protest against the unlawful diversion of the money. We are unable to find any fund which defendants might lawfully use with which to pay attorney's fees, and find no authority of law for levying a tax to meet such expenses. It might be well for the Legislature to make provision to meet such a case as this; but, as it has not done so, we can not create such a law, no matter how desirable it may be. See, as sustaining these conclusions, *Higley v. Bunce*, 10 Conn. 436; *Westbrook v. Deering*, 63 Me. 231; *Coolidge v. Brookline*, 114 Mass. 592; *Minot v. W. Roxbury*, 112 Mass. 1 (17 Am. Rep. 52).

Defendants do not challenge the right of plaintiff to the relief demanded in the event we find there is no law for paying out the money; hence we do not consider the appropriateness of the remedy. It will be time enough to decide that matter when the question is presented by proper pleadings and sustained by argument. Our burdens are heavy enough without suggesting and disposing of questions which have not been presented or argued by counsel.

On the record before us we think the trial court was in error in its conclusions, and the judgment and decree must be reversed and the cause remanded for one in harmony with this opinion.—*Reversed and remanded.*

B. I. SALINGER, Appellee, v. WESTERN UNION TELEGRAPH COMPANY, Appellant.

Telegraphs: NEGLIGENCE: DAMAGES: EVIDENCE. In this action for negligent delay in the transmission and delivery of a telegram plaintiff's direct examination touching his damages only purported to state approximately his expense items, one of which was a

claim for railroad fare. *Held*, that on cross-examination he should have been permitted to state whether he actually paid out any money for transportation or whether he rode on free transportation, and whether the amount stated was what he supposed the actual fare was, or was the expense actually incurred, as tending to test his knowledge of and opportunity to know what the fare actually was.

Same. In an action for damages for unreasonable delay in the transmission and delivery of a telegram, the plaintiff not only has the burden of showing delay but in proving his damages also. And even though the evidence is sufficient to warrant a verdict, still, the amount of recovery is a question for the jury; especially where, as in this case, the damage claimed included an item for the value of plaintiff's time in a stated employment and it was not clear that he was thus employed; and especially where the item of damage was the subject of expert evidence which is not conclusive although uncontradicted.

The evidence in this action is held insufficient to warrant the court in directing a finding for plaintiff as to the amount of his damage.

Appeal on certificate: SUFFICIENCY OF CERTIFICATE AND ABSTRACT.

3 Although the statute provides that the certificate in cases of appeal involving less than one hundred dollars shall be made by the trial judge, still, where it appears from the abstract that the certificate was made by the judge while sitting as a court there is a sufficient showing of compliance with the statute. But if this were not so the abstract in the instant case not only states that the court signed the certificate but it sets out the certificate in full which purports to be signed by the judge and is therefore sufficient.

Telegraphs: NEGLIGENCE: DAMAGES RECOVERABLE. Where a cause of action against a telegraph company has fully accrued, expenses reasonably necessary and constituting part of plaintiff's damages may be recovered, although incurred after his claim was served on the telegraph company as required by the statute.

Appeal: MOTION FOR AFFIRMANCE: SERVICE OF ARGUMENT. A motion for affirmance for failure of appellant to serve his argument in time should be made before the original submission of the cause, and when filed with the petition for a rehearing after the opinion has been rendered on the original submission, it will not be considered.

Same: FAILURE TO SERVE ARGUMENT: EFFECT. Although a failure of appellant to serve his argument in time would furnish an excuse for the failure of appellee to file his argument in answer to it,

it would not be an excuse for failure to ask an affirmance on account thereof before the original submission.

Appeal from Carroll District Court.—Hon. Z. A. Church, Judge.

SATURDAY, MAY 14, 1910.

ACTION to recover damages resulting from the negligence of defendant in failing to transmit and deliver a telegram addressed to plaintiff. Verdict and judgment for plaintiff for \$95, from which defendant appeals; the judge or court granting a certificate of appeal on defendants' request.—*Reversed.*

Lee & Robb, for appellant.

B. I. Salinger, pro se.

PER CURIAM.—Plaintiff alleges that on the 9th of February, 1903, he sent a message by defendant's line from Milwaukee to one Korte, at Carroll, Iowa, which was also plaintiff's place of residence, in this language, "Wire quick how soon I must be home," and in response to this message Korte delivered to the defendant company for transmission to plaintiff, at Milwaukee, a telegram, advising him that he need not be at home in Carroll until noon of Wednesday, February 11, 1903; that the said message was, through the negligence of defendant, either never transmitted at all, or not delivered to plaintiff at the destination indicated; that plaintiff had unfinished business in the cities of Milwaukee and Chicago, and also causes pending in the district court at Carroll, and sent his message to ascertain whether he might finish his business in said cities, and still have time to reach Carroll to attend the management of said causes; that, failing to receive any answer, he was greatly worried and men-

tally disturbed, and obliged for safety's sake to return to Carroll before finishing his business in said cities; that, if he had received the answer sent by Korte, he could have finished his said business, and would have been free from mental anxiety; that he has since been obliged to return to said cities to finish said business, which would have been unnecessary if the said message had been transmitted and delivered to plaintiff; that by reason of the premises he has been damaged in the sum of \$99.75; and that on February 16, 1903, he filed with defendant a written demand and statement of claim against defendant, in which defendant was advised of the nondelivery of the message, and on account of not getting it he came home without finishing his business, and "will have to return for that purpose."

The plaintiff was examined as a witness in his own behalf. He testified that, after arranging his matters in court at Carroll, he returned to Milwaukee to finish up his business there. As bearing on the measure of his damages, he testified as follows: "A. I think the railroad fare was about \$15 each way. The sleeping car fare between Chicago and Carroll was \$2.50 each way. And on the way home I couldn't say exactly what the meals cost, probably \$1.50 for the trip. Two meals to eat. (Defendant moves to strike out the answer of the witness for the reason it is incompetent, irrelevant, and immaterial, not a proper measure of damages in this case, and it is not what the fare would be, but what he had to pay. Motion overruled. Defendant excepts.) Q. Now, you were compelled to return to Chicago and Milwaukee after that to finish your business? (Defendant makes same objection. Same ruling, and defendant excepts.) A. I was compelled to return and finish my business, and did so. As soon as I got home, I found out that this answer had been sent. As soon as I got things straightened up, I returned. The fare to Milwaukee was something like

\$15, and the sleeping car fare was \$2.50, and the meals cost on each particular trip probably \$1.50 each way. (Defendant moves to strike out the evidence of the witness here upon the question as to what the railroad fare and sleeping car fare was, as the response being the fare was so much, and not being as to what he actually paid for the trip. The fare is not the measure of damage, but the actual outlay by himself. Motion overruled. Defendant excepts.) A. I have not said that I was compelled to pay \$15 railroad fare, \$2.50 sleeper fare, and \$1.50 for meals coming this way. Q. Say what it should be. (Same objection. Same ruling. Defendant excepts.) A. I said I was compelled to make one useless round trip between Carroll and Milwaukee, and that the round trip fare was something like \$30, and that the sleeping car fare was something like \$5. The meals on the road simply on the round trip would be something like \$3. But that item I can not tell exactly because I can not tell what hour exactly I made the second useless trip." He also testified that the return to Milwaukee consumed two days' time. As to the value of his time, he testified as follows: "At that time, court being in session, and my time to anybody and myself included was worth at least \$25 a day." All the foregoing testimony was received over abundant objection by the defendant. On cross-examination he testified that he was not attending court in Milwaukee, and the "matters in this court were disposed of when I went back." On cross-examination defendant propounded to the witness the following questions: "Q. Now, isn't it a fact, Mr. Salinger, that in the matter of railroad fare that you didn't pay out any money, but rode on transportation? Q. Isn't it a fact, Mr. Salinger, that you didn't pay out any money in your trip coming and going on the railroad? Q. The amounts that you have given here in response to your counsel's interrogatories as to what was expended, you were merely giving

as what you suppose the actual fare for the trip, and not any expenses actually incurred." To each of these questions the plaintiff interposed an objection as incompetent, irrelevant, and immaterial, and not cross-examination, and this objection was sustained as to each.

I. The plaintiff was the only witness in his own behalf, and substantially all of his testimony has been set forth above. The defendant introduced no evidence. The trial court instructed the jury as follows: "The negligence of the defendant having been established, you are further instructed that under the undisputed testimony the plaintiff is entitled to recover at least the sum of \$88.75, and your verdict must be for the plaintiff, and not less than \$88.75. You should also allow the plaintiff such further damages as the evidence may show you resulted to him from mental worry due to defendant's negligence. But since plaintiff does not claim more than \$99.75 in all, therefore you can not allow more than \$11 for the said alleged worry. Your verdict must be for the plaintiff. It must not be less than \$88.75 and can not be greater than \$99.75."

The appellant complains of the rulings of the court as above indicated and of these instructions which were duly excepted to. The points involved are so connected

i. **TELEGRAPHS:** that we will consider them together. We **negligence:** will direct our first attention to the attempted **damages:** **evidence.** **cross-examination** of the plaintiff as to what, if anything, he actually paid in the way of expenses. Appellants' argument is partly based upon the assumption that the manifest purpose of the cross-examination was to show that the plaintiff traveled upon a free pass, and that therefore the cross-examination should have been permitted. It is argued by appellee that there is not a suggestion contained in the record proper that he traveled upon a free pass, and that this assumption is unwarranted. It is argued that the word "transportation," which was

used in the cross-examination, does not necessarily import free transportation. It is also argued that such an act on his part would have been a violation of the interstate commerce act and therefore criminal, and that we should not indulge in a presumption of criminality as a basis for a review of the record. For the sake of the discussion, let appellee's contention be conceded. The proposed cross-examination was nevertheless clearly permissible. The plaintiff in his direct examination only purported to state approximately the usual fare. It was stated in round numbers as "something like." The proposed cross-examination fairly tended to test the knowledge of the witness, and his opportunity to know what the actual fare was. If the word "transportation" may be construed as something more than a free pass, it might also be construed as something less or other than regular fare. It might be applied to an excursion rate, and this might be less than the fare as testified to by the plaintiff. From any point of view, we see little justification for the trial court's refusal of the cross-examination. However, just what the answers to such cross-examination might have disclosed is a question so problematical and uncertain that we would hesitate to reverse on account thereof.

But the trial court not only emphasized the error in his instructions, but quite supplanted the jury in his peremptory direction that their verdict must be for the

plaintiff and for not less than \$88.75. The
2. SAME. only warrant for this direction was that the plaintiff testified to the items above indicated and to the loss of two days' time at \$25 a day. The burden was upon the plaintiff to prove not only the unreasonable delay on the part of the defendant in the delivery of the message, but his measure of damage also. Granted that his testimony was sufficient and abundant to warrant the jury in rendering the verdict which the court directed, the question was nevertheless a jury question. This is particularly

true as to the value of the lost time. Not that the amount of the claim for lost time was so extraordinary as contended by appellant, but the answer of the plaintiff as a witness did contain the implication that \$25 per day was fixed upon as the value of his time while in court. His cross-examination discloses the fact that he was not engaged in court on his Milwaukee trip, and that he finished his court business at Carroll before the trip was made. It is a matter of common knowledge that attorneys do make a distinction between the value of their time and service in court as compared with time and service while out of court, and this distinction is implied in the plaintiff's testimony. There is the further consideration that items of this kind must be proved by opinion evidence, and such opinions are in the nature of expert opinions. We have always held that juries are not bound by them, even though they be uncontradicted. Assuming, therefore, that the evidence was sufficient to warrant the jury in accepting it, it was not such as to warrant the court in directing a peremptory finding thereon. *Chicago, A. & N. Ry. Co. v. Whitney*, 143 Iowa, 506..

II. The amount involved in this case is less than \$100. It comes to us on a certificate of the trial judge under section 4110, Code. Appellee assails the sufficiency of such certificate, or, rather, the sufficiency of the showing in the abstract that a proper certificate

**3. APPEAL ON
CERTIFICATE:
sufficiency of
certificate
and abstract.**
was made. It is claimed that the abstract discloses that the certificate was made by the "court;" whereas, the statute requires it to be made by the "trial judge." The basis for this contention is that the judgment entry in the case contained the following statement: "Defendant is granted a certificate of appeal." The abstract also contains a statement that "the court before whom the said cause was tried signed a certificate," etc. It is argued that the statute makes a distinction between the terms "court" and

"judge," and this is undoubtedly so. A "judge" is not necessarily a "court," although a "court" necessarily includes the "judge." If the statute had required the certificate to be made by the court, it might be more plausibly argued that it was not sufficient that such certificate be made by a judge. The converse of this argument is not so plausible. If an act is required to be performed by the "judge," we see no reason why it may not be lawfully performed by such judge while sitting as a "court." Be that as it may, the further statement of the abstract quite cuts the ground from under the contention of appellee. The abstract not only states that the court signed a certificate, but it sets out the certificate in full, and this certificate purports to be signed by "Z. A. Church, Judge." This certificate complies with every formal requirement of the statute, and the abstract avers that it was duly filed in the cause. We think it was sufficient.

III. The defendant moved in the court below for a dismissal of plaintiff's case on the ground that the alleged expense incurred by him did not accrue until after

4. **TELEGRAPHS:** he served his written claim under the provisions of section 2164 of the Code, and it presents the same question here. The alleged tort of defendant occurred on February 9th. Plaintiff returned home on February 10th. His written claim or demand was served upon defendant on February 16th. His return trip to Milwaukee occurred afterwards. The loss of time and expense of this trip furnished the larger part of plaintiff's measure of damage. We think the point is without merit. The provision of the statute is that such a claim must be made "within sixty days" after the cause of action accrues. We are not prepared to say that the service of such claim would have been premature even though plaintiff's cause of action had not fully accrued, provided the tort of the defendant was complete. In this case the necessity for such extra trip back to

Milwaukee as a result of the alleged tort created a liability on the part of the defendant to the plaintiff for the loss of time and expense reasonably necessary to accomplish it. Its liability for such necessary trip was neither more nor less after it was actually made than it was after it was rendered necessary, although the method of proof would be different. Future expenses reasonably necessary to be incurred often form a part of the measure of damages.

IV. The appellee has filed a motion for affirmance of the judgment on the alleged ground that appellant failed to serve his argument upon him within the time provided

by the rules of the court. This motion was
5. **APPEAL:** motion for affirmation: service of argument. not filed prior to the original submission of the case. It was filed only after an opinion had been handed down after the original submission, and was filed simultaneously with the petition for a rehearing. Under such circumstances, the appellee is not entitled to a consideration of his motion. If he desired to ask an affirmance upon such ground, he should have asked it before the original submission. If his contention be true that proper service of appellant's argument was not made upon him within the time provided by the rules, such failure was in no sense jurisdictional.

There is an issue between the parties as to whether service of appellant's argument was made. Assuming that it was not, such failure would furnish abundant excuse

6. **SAME:** failure to serve argument. for the failure of appellee to file an answering argument. In such case he could not be deemed to know that there was any argument on the part of appellant to be answered. But such alleged failure on the part of appellant furnished appellee no excuse for failure to ask an affirmance on account thereof before the original submission. The submission of the case was taken in ordinary course. The appellee knew then, as well as he knows now, that appell-

lant's argument had not been served upon him. Nor is he in any position now to complain of a want of opportunity to make argument on his own part. The granting of a rehearing necessarily annulled the former opinion and afforded appellee an opportunity for argument, and he has fully availed himself thereof. We will not, therefore, undertake to determine whether the attempted service of appellant's argument was legally sufficient or not.

V. Whether the customary fare can be regarded as an item of damages where plaintiff has traveled upon a free pass is a question upon which we reserve opinion. On some phases of it we are not wholly agreed. In view of the great doubt whether it fairly arises upon this record, we prefer to leave it as an open question for future consideration in a proper case.

For the errors already noted, the judgment entered below must be *reversed*.

DAVID W. JONES, Appellant, v. H. L. BUCK, Appellee.

Agency: COMMISSION CONTRACT: EVIDENCE. In this action to recover commission for the sale of real estate, the evidence is reviewed and held insufficient to establish the contract sued upon for a stated commission.

Same: ESTOPPEL. Where a real estate agent, as in this case, consented to an abandonment of the sale he had been negotiating and returned to the proposed purchaser his deposit of earnest money, the agent was thus estopped from claiming a commission, unless as contended he fulfilled the conditions on which he then secured the right to an extension of the time for making the sale for the purpose of securing a loan for the purchaser, thus to enable him to complete the purchase; but the evidence fails to establish compliance with the extension agreement.

Appeal from Johnson District Court.—Hon. R. P. HOWELL, Judge.

SATURDAY, MAY 14, 1910.

ACTION at law to recover commission for the sale of real estate. There was a directed verdict and judgment for the defendant, and plaintiff appeals. *Affirmed.*

W. R. Hart and W. J. Baldwin, for appellant.

Ranck & Bradley, for appellee.

PER CURIAM.—Plaintiff alleges that he entered into an express oral contract with defendant, whereby he undertook to furnish a purchaser for defendant's farm, for which service he was to receive compensation at the rate of \$1 per acre of land sold. The defendant denies the claim stated in the petition, and denies that plaintiff found or furnished a purchaser for his land. There is but little real conflict in the testimony as to most of the material facts. The defendant owned a farm in Johnson County, but at the time in question had gone away, leaving his business interests there to the oversight of his brother, E. O. Buck. There had been some sort of understanding between plaintiff and defendant, by which, if the plaintiff produced a purchaser to whom defendant could make satisfactory terms of sale, plaintiff should receive a commission. Plaintiff understood, however, that defendant wished to get at least \$60 an acre or any aggregate price of about \$13,000, and to have a cash payment thereon of \$6,000 or \$7,000. About December 9, 1907, defendant visited Johnson County, and had an interview with plaintiff, who says defendant then "told me we had a prospective purchaser in the western part of the state, and wanted me to withdraw it off the market." Later he says defendant came in again and authorized him to renew his efforts to make a sale, and agreed to pay a commission of \$1 per acre. Thereafter plaintiff sought to make a sale to one Leeny, who

offered to purchase at \$60 per acre, paying \$3,000 down and \$10,000 in deferred payments secured by a mortgage on the land. Plaintiff accepted the offer on condition of its approval by defendant, and received from Leeny a check for \$200 to apply on the cash payment, giving a receipt therefor, and agreeing to return it if the sale was not consummated. He then telegraphed the offer to defendant, who answered by letter, objecting to the cash advanced of \$200 as insufficient, and telling plaintiff he would not pay a dollar an acre for commission upon a sale at \$60 per acre. The letter closed with a direction to plaintiff to see E. O. Buck, and that any agreement made with him would be all right. A writing was thereafter made and signed between Leeny and E. O. Buck as agent for his brother, but, as printed in the abstract, it is so incomplete and confused in form and substance as to be quite unintelligible except as the same is supplemented by the oral testimony. It is the testimony of Leeny, who was called as a witness for plaintiff, that as an inducement to the purchaser plaintiff agreed to procure for him a loan of \$7,000 on the land to enable him to meet the terms of the contract, and, while plaintiff does not admit that this was a condition of the deal, he concedes that he did undertake to assist in the matter. At any event, it developed that the loan was not procured, and Leeny finally refused to go further. The three persons, plaintiff, E. O. Buck, and Leeny, then met, and, Leeny demanding that the deal be abandoned, the written contract was surrendered, and, while plaintiff was reluctant to consent, he finally did so, and returned the check which he had received as the advance payment. This being done, he complained that he had not been given a fair chance to procure the money for Leeny, and it was then agreed that, if he should succeed in obtaining the promised loan of \$7,000 by noon of the following Saturday, Leeny would still take the land. At the expiration of the stipulated

time plaintiff claimed to have found the money. It appears according to his own statement that he had found one person who would lend \$6,500 on the land and another who would lend Leeny the further sum of \$500 on his promissory note with approved security, and this he insists was such a fulfillment of the agreement as to entitle him to his commission. Leeny declined to proceed on those terms, and the sale was abandoned. It appears, however, though indirectly, that at a later date defendant finally sold the land to Leeny, but on terms materially different than was contemplated in the prior negotiations. From this it is further argued by plaintiff that he is entitled to a commission notwithstanding the abandonment of the first deal. But there are insuperable objections to any recovery in this case.

In the first place, plaintiff's petition states no claim upon a *quantum meruit*, but plants his case solely upon an alleged express contract for a commission of one dollar per acre for procuring a purchaser, and, if there was no evidence of such a contract on which he was entitled to go to the jury, then there was no error in directing a verdict against him. *Hunt v. Tuttle*, 125 Iowa, 676. And this, as we read the record, is precisely the condition of the case now before us. True, plaintiff swears that in his last personal interview with defendant it was agreed between them that, if he succeeded in finding a purchaser satisfactory to the defendant, the latter would pay a commission of \$1 per acre. But according to his own showing, when he reported the proposed sale, defendant at once responded, rejecting the offer and notifying plaintiff that he would not pay the commission upon a sale at \$60 per acre. Here, then, was a distinct termination of the contract as to \$1 per acre commission, so far at least as any sale of \$60 per acre is concerned, and, unless there be evidence of some express or implied renewal thereof, there can be no recovery herein. He testifies explicitly that there was

no subsequent agreement on the subject with the defendant or with E. O. Buck, his agent. He says, "I made no contract with Ed. I do not claim that his brother Ed made any contract to give me a dollar per acre"—and, so far as the record shows, he never had any further direct communication with the defendant after the receipt of the letter refusing to ratify a sale on that basis. There was therefore a palpable failure of proof of the contract sued upon, and this alone is sufficient to require an affirmance of the judgment.

It may also be said that, when plaintiff consented to the abandonment of the sale which he had been negotiating and returned the deposit of earnest money, he estopped himself from claiming any commission for his service unless he fulfilled the condition on which he secured the privilege of time until the following Saturday to secure a loan on the land for Leeny, and thus enable him to complete the purchase. This he did not do. The promise of one person to make a loan of \$6,500 on the land and of another to furnish \$500 on personal security was not a substantial compliance with the condition. Nor is there any evidence whatever that the abandonment of the deal by Leeny and defendant was designed to defraud the plaintiff.

There is no reversible error in the record, and the judgment of the district court is *affirmed*.

EVANS, J., taking no part. DEEMER, C. J., dissenting.

WOODBURY COUNTY and D. B. SHONTZ, Appellants, v. O. B. TALLEY, County Treasurer, Appellee.

Taxation: ASSESSMENT OF OMITTED PROPERTY: *mandamus*. A proceeding before the county treasurer to have omitted property added to the assessment roll and listed for taxation, in which notice to property owners was given and to which they appeared and offered evidence, is *quasi judicial*; and the act of the treas-

urer in determining that the property is not taxable is of a judicial character and is not void, although it may be erroneous; and *mandamus* will not lie to review his act and compel the treasurer to make an assessment of the property in behalf of the county.

Appeal from Woodbury District Court.—Hon. F. R. GAYNOR, Judge.

SATURDAY, DECEMBER 18, 1909.

REHEARING DENIED MONDAY, MAY 16, 1910.

THE case is sufficiently stated in the opinion.—*Affirmed.*

Ben McCoy, McCoy & McCoy, and Struble & Struble, for appellants.

Milchrist & Scott, for appellee.

WEAVER, J.—The Sioux City Stockyards Company is a corporation organized under the laws of this state, and having its principal place of business at Sioux City. It is capitalized at \$3,000,000, represented by fifteen thousand shares of preferred stock, having a market value of \$65 per share, and a like number of shares of common stock, having a market value of \$20 per share. Its business is the owning, managing, and operating of stockyards at Sioux City, in pursuance of which it owns real estate with the necessary and convenient buildings, appurtenances, and appliances required in carrying on said business, and is authorized to buy and sell live stock or keep and care for the same for others. It constructs, owns, and operates railways, tracks, and rolling stock upon and about its property, and generally it does and may do all those things which go to the keeping, operating, and man-

aging of stockyards as the same are ordinarily maintained and carried on in the larger cities and packing centers of the country. The larger blocks of stock are owned and controlled by the great packing house firms and corporations of the West, the remainder being distributed in small holdings in many hands. The corporation appears to have been doing a large business and to have acquired tangible property of considerable value. The controversy presented by the case now before us concerns the assessment of the property of the corporation and its shares of stock for the purposes of taxation. Our Code (section 1323) provides as follows:

The shares of stock of any corporation organized under the laws of this state, except those which are not organized for pecuniary profit, and except corporations otherwise provided for in this act, shall be assessed to the owners thereof at the place where its principal business is transacted, the assessment to be on the value of such shares on the first day of January in each year, but in arriving at the total value of the shares of stock of such corporations, the amount of their capital actually invested in real estate either in this state or elsewhere, shall be assessed as other real estate, and the property of such corporation, except real estate situated within the state, shall not be otherwise assessed. . . .

In Code, section 1318, is found a provision regulating the assessment of merchandise purchased or consigned and held for sale by merchants to which provision is appended the following clause: "The provisions of this section shall apply and constitute the method of taxation of a corporation whose business or principal business is of a like character and shall be in lieu of any tax on the corporate shares." For the years 1903 to 1907, inclusive, the assessor of that taxing district treated the stockyards company as a "merchant," listed and assessed its property under the provisions of Code, section 1318,

just quoted, and did not list or assess any of the shares of stock either to the corporation or to the individual shareholders. Whether this result was accomplished by argument or hypnotism does not appear, but it seems to be conceded that such assessments were returned to the equalizing board which passed them, no one raising objection thereto, and taxes were duly levied upon such assessments and collected by the ordinary methods. Near the close of the period, Shontz, one of the plaintiffs herein, having obtained a contract to ferret out property withheld or omitted from taxation in Woodbury County, entered upon the work, and, discovering that these shares of stock had not been assessed, and believing they were liable to taxation, brought the matter to the notice of the county treasurer. Thereupon said officer notified the shareholders or some of them of the claim that was made, and gave them an opportunity to appear, and show cause why their shares should not be assessed. At the hearing an agreement was made whereby a test case should be tried, and, so far as applicable, the evidence offered and the order made in the one case should apply to and govern all the others. On the part of the shareholders objection to the proposed assessment was made on the following grounds:

(1) Said shares are not assessable under the laws of the state of Iowa. (2) The shares of stock of said corporation are exempt from taxation under section 1318 of the Code of Iowa, provision therein being made for the taxation of the property of said corporation in lieu of any tax upon said corporate shares. (3) The Sioux City Stockyards Company is a corporation whose business, or principal business, is of like character to that of a merchant, and is a merchant within the purview of section 1318 of the Code of Iowa, and was such during all of the years referred to in the notice served upon the objector. That during all of said years, 1903, 1904, 1905, 1906, and 1907, all of the property, real and personal of the Sioux City Stockyards Company was assessed and

taxed strictly in conformity with said section 1318, and said company furnished all of the information and evidence required by the statutes of Iowa, and said assessment was not changed nor altered by any board of review or other reviewing tribunal, and the Sioux City Stockyards Company seasonably and promptly paid all of said taxes so levied during any and all of said years, and such assessment and taxation and the method observed in so assessing and taxing the property of said corporation constitutes a final determination and adjudication of all questions relative to the taxation of said shares of stock, and Woodbury County and its authorities and all of those interested in said proposed assessment are concluded and estopped from questioning the act of said assessors.

After hearing evidence of the facts concerning the nature of the business of the stockyards company and of the number and value of its shares, the treasurer overruled the demand of Shontz and the county for the assessment of said shares. The decision was in writing, and is as follows:

In the matter of the county treasurer assessing the corporate stock of the Sioux City Stockyards for the years 1902 to 1907, inclusive, the following facts were agreed on, admitted by all parties or undisputed in the evidence offered before me, to wit: That the assessor made an examination of the character of the business carried on by the corporation for each of these years, and conferred with the officers of the company, and decided that the corporation was assessable as a merchant under section 1318, and not on its corporate stock under section 1323 of the Code of Iowa, as a corporation not otherwise assessable. That such assessment was made in good faith and not procured by fraud, and that a large and profitable part of this business at least was selling hay and feed, merchantable in character. I, as treasurer, am asked to decide the same question that the assessors had to before they made the assessments, to wit, whether the stockyards company was assessable as a merchant or on its corporate stock as not otherwise assessable. The assessor must have decided that "the business or principal business

(of this corporation) was of like character" to that of a merchant under the wording of section 1318, and not under section 1323. The law made it his duty to decide what its principal business was and he had a right so to decide, and, if he had such duty and right and did so exercise it by determining that it was assessable as a merchant, such assessment can not be void. It was stated in the argument by Mr. Shontz's counsel that I must find the acts of the assessor absolutely void, and all taxes assessed and paid thereunder illegal in order to give me the right to assess the capital stock as omitted property or property not otherwise assessed. This I do not think I can do. The county treasurer has no more authority than the assessor, does not act as a reviewing officer for all the acts of the assessor in the county, and can not redecide the same questions, even though the treasurer might, from the evidence now presented, come to a different decision from that made by the assessors. This question that the treasurer can not review the acts of the assessor, where such assessor had authority to act and did act, has been decided by the Iowa Supreme Court, and I will follow those decisions until this court decides otherwise.

I therefore decide that there is nothing left for me to assess against the stockyards company, or its corporate stock.

No attempt appears to have been made to obtain a review of the decision by certiorari or otherwise. Later this action in mandamus was instituted by the county and Shontz as joint plaintiffs, alleging the facts as to the omission of the corporate shares from taxation, the assessment of the corporate property under the provisions of Code, section 1318, and, after setting forth the proceedings had before the county treasurer with the facts which had been stipulated and agreed to upon said hearing and the written decision made by such officer, the allegation is made that, notwithstanding the demand of the plaintiffs, the treasurer refused to determine the matter before him except as shown by the written decision, and refused to list and assess said shares for taxation. Upon this showing, a demand is made

for a peremptory writ of mandamus commanding said treasurer "to proceed upon the facts and evidence before him to assess, in the assessment district of Sioux City, Iowa, and extend upon the tax lists of said county against each of the parties named a tax upon the shares of stock in said Sioux City Stockyards Company held by each of said persons on the 1st day of January of each of the years, 1903, 1904, 1905, 1906 and 1907, at the rate of taxation fixed by the authorities for each of said years" with interest, etc. To this petition the treasurer demurred on the following grounds: (1) It appears from the allegations of plaintiffs' petition that the question as to whether the Sioux City Stockyards Company should be assessed under Code, section 1323, or section 1318, was fully investigated by the assessor, and he determined that said company should be assessed as a merchant under the latter section, and said company was so assessed during each of the years 1903, 1904, 1905, 1906, and 1907. (2) It appears from the allegations of plaintiffs' petition that this defendant has fully considered and determined that the stock of the Sioux City Stockyards Company is not subject to assessment as property withheld or omitted from assessment under Code, section 1374. (3) It appears from the allegations of plaintiffs' petition that the stock of the Sioux City Stockyards Company can not be assessed for any of the years named in said petition. (4) This court has not jurisdiction to determine the assessable value that should be placed upon the stock of the Sioux City Stockyards Company, nor to direct the treasurer to assess said stock at any fixed value. (5) The facts stated in the petition do not entitle the plaintiffs to the relief demanded.

This demurrer was sustained, the petition dismissed, and plaintiffs appeal.

If this case presented the single question whether the assessor having determined that the corporate property was assessable under Code, section 1318, thereby exempt-

ing the shares from taxation, and such assessment having passed the board of review unchallenged, it is competent for the county treasurer or within his jurisdiction to review such assessment or to correct the mistake if any by listing and taxing the omitted shares the court might not be entirely unanimous as to its correct solution, but there is another question arising upon the face of the record which, we are united in holding, must dispose of the appeal adversely to the appellant.

The action of mandamus is employed "to obtain an order on an inferior tribunal, board, corporation or person to do or not to do an act the performance or omission of which the law enjoins as a duty resulting from an office, trust, or station. Where discretion is left to the inferior tribunal or person mandamus can only compel it to act but can not control such discretion." Code, section 4341. Without at all challenging the general soundness of the legal principles stated in appellant's brief or questioning the authorities cited, it appears to us very clear that the conceded facts exclude the remedy by mandamus. While demanding that the treasurer act upon the facts and evidence produced before him and determine the question submitted to his decision, the petition shows that he has already acted and already made his decision. What the appellants really ask the court to do is to command the treasurer to act again, to reverse and set aside the decision made by him, and to make another which shall accord with appellant's view of the law. Certainly this is not the office of mandamus. If the treasurer has any discretion in such cases, if his decision is either judicial or *quasi* judicial, the order made by him may be erroneous, but it is not void, and his errors must be corrected by appeal where a right of appeal is given or by *certiorari* or other appropriate method of review. Mandamus does not contemplate the review of judicial acts or orders. That the treasurer does act judicially in the performance of this

duty we have frequently held. *Bank v. Carroll*, 128 Iowa, 230; *Stevens v. Carroll*, 130 Iowa, 463; *Gibson v. Cooley*, 129 Iowa, 529. We have so held as to the acts of the assessor acting within his proper jurisdiction. *Van Wagenen v. Supervisors*, 74 Iowa, 716; *Judy v. Bank*, 133 Iowa, 252. In the proceeding before the treasurer we find all the essential elements of a judicial hearing. The county, or the ferret acting in its behalf, informs the treasurer of an alleged discovery of taxable property which has been omitted by the assessor, and demands that it be listed and taxed. Notice is then given the owner of said property to appear and show cause against the proposed assessment. At the hearing the parties may appear in person or by counsel, and, the owner having stated his objections, evidence is or may be offered in support of both claim and defense. The issue thus made is decided by the treasurer. The authority to decide a disputed question implies the exercise of discretion, and this implies the right to decide it for or against the contention of either party. As an abstract proposition, the decision may be wrong, but the wrong is not to be righted by a writ of mandamus. *Meyer v. Dubuque County*, 43 Iowa, 592. The case here cited would seem to be quite in point with the one at bar. There the plaintiff sought to compel by mandamus the striking from the assessment roll certain moneys and credits which she claimed had been listed without authority. In holding that the remedy was inappropriate, the court, after quoting the statute on mandamus, says: "The Code provides a board of equalization, and authorizes any one aggrieved to appear before such board, and have any error in assessment corrected. It is clear that such board is vested with a judicial discretion. It must examine the case, consider the facts presented, and then decide. If such board refuses to act at all, it omits a duty, and may be compelled by writ of mandamus to discharge that duty. But the petition does not allege

any refusal of the board to act. On the contrary, it avers that plaintiff petitioned the proper officers of the county to strike out the assessment, and that they acted upon his application and refused to strike out the assessment. Now, if the writ should issue, it would compel the board to do only what they have done, to wit, to act upon the application. Hence there has been no omission of duty, and from the showing made in the petition there is no cause for the writ of mandamus." We see no reason why the law which is here applied to the functions of the board of review is not equally applicable to the somewhat similar functions exercised by a county treasurer in adding property to an assessment roll.

Without, therefore, entering upon any consideration of the merits of the claim that these shares of corporate stock should have been listed and assessed, we are constrained to hold that the remedy by mandamus is not available to the appellants, and that the demurrer to their petition was properly sustained.

The judgment of the district court is *affirmed*.

ADAM ECKERT and ELLIS VAUGHN v. CENTURY FIRE INSURANCE COMPANY, Appellant.

Evidence: WHEN NOT SUFFICIENT TO CREATE A CONFLICT. Where an insured, as in this action, testified that he informed defendant's agent at the time he drew up the application for insurance that there was a mortgage on the property, the agent's testimony that he had no recollection that insured so informed him, and that his first knowledge of the mortgage so far as he could recollect was after the loss occurred, was not sufficient to create a conflict in the evidence and a directed verdict on that issue was proper.

Insurance: APPLICATION: NEGLIGENCE: FRAUD: ESTOPPEL. Where the agent of an insurance company fills out an application for insurance from information furnished by the insured, negligence can

not be predicated on the fact that the insured signed the same without reading it. And knowledge concerning the condition of the property insured thus imparted to the agent will be imputed to the company, and will estop it from insisting on the invalidity of the policy because of a false statement in the application not attributable to the insured.

Same: BREACH OF CONDITION: FORFEITURE: ESTOPPEL. Failure of an insured to examine a policy issued to him and to return the same if the application attached is not in accordance with his statements, will not render the policy void or forfeit his rights thereunder; although failure so to do might estop him from claiming that his statements were incorrectly recorded by the agent who made out the application, if estoppel were pleaded.

Appeal from Pottawattamie District Court.—Hon. W. R. Green, Judge.

THURSDAY, JANUARY 13, 1910.

REHEARING DENIED MONDAY, MAY 16, 1910.

SUIT on a policy of fire insurance. There was a directed verdict and a judgment thereon for the plaintiffs. The defendant appeals.—*Affirmed.*

Read & Read, for appellant.

Saunders & Stuart, for appellees.

SHERWIN, J.—On the 15th day of February, 1904, the plaintiffs as copartners bought and took possession of a livery stock in the town of Walnut, Iowa. On the same day they executed a chattel mortgage on the same stock for the sum of \$1,600, and said mortgage was duly recorded on the 16th of February, 1904. On March 3, 1904, the firm made written application to the defendant for insurance on said stock, and on the 7th of March, 1904, the defendant issued a policy insuring the same. On

the 11th day of August, 1906, the plaintiffs suffered the loss for which they seek recovery in this action. The written application was signed by one of the plaintiffs for the firm, and it was provided therein, among other things, that it contained a full and "complete statement and exposition of all facts in regard to the conditions, . . . and risk of the property to be insured, and warrants the same to be correct and true, whether written by said applicant in ink or not. No liability of the company shall attach until approved by the home office. And the undersigned applicant to the proposed insurance hereby agrees to accept the policy issued upon this application, or to return the same at once to said company if not in accordance with his statements; and if any untrue statement has been made herein, or untrue answer given to any of the foregoing questions, then this instruction to be void and the policy of no effect." The application contained the inquiry: "Is any of the property to be insured incumbered?" and the question was answered, 'No.' in writing. The application was made a part of the policy, and the policy itself provided that, 'if the subject of insurance, or any part thereof, be or become incumbered by mortgage, . . . it should be void.'

The facts necessary to an understanding of the case were as follows: The plaintiffs had given a chattel mortgage on the stock to secure a part of the money used in

i. EVIDENCE:
when, not
sufficient to
create a
conflict.

the purchase thereof. They wanted to insure, and talked with M. L. Spangler, the defendant's local agent, about insuring in

said company. One J. E. Flynn was a special agent of the defendant, and Spangler took him to the plaintiffs for the purpose of securing the risk. Flynn took the application, filling the blanks therein himself, and it was signed by Eckert for the firm without reading it. Spangler knew of the mortgage on the stock, and he testified that he told Flynn before the application was

taken that the stock was mortgaged. Eckert testified that, when Flynn was filling out the application, he asked the question whether the property was incumbered; that he answered that it was; that he did not see the answer that Flynn wrote to the question, or knew that he had written a negative answer thereto, until after the fire. Flynn testified but did not deny that Spangler and Eckert had informed him of the mortgage. He did testify, however, that he had no recollection of their so informing him, and that, as far as he could remember, his first knowledge of the mortgage was received through a letter from the president of the company after the loss. We think the testimony of Flynn did not raise a conflict in the evidence on that point. The fact that he did not remember the conversations with Spangler and Eckert would not necessarily tend to create such conflict. Nor would his further statement that, as far as he could remember, he did not know of the mortgage until after the fire. The latter statement was but a reiteration that he had no recollection of the conversations testified to by Spangler and Eckert, for there was no claim that he had received information as to the mortgage from any other source. So far then as the fact of the notice is concerned, the trial court properly directed a verdict.

We have held that the insured is not negligent because he does not read the application for insurance which he signs. *Chismore v. Anchor Ins. Co.*, 131 Iowa, 180;

Fitchner v. Fidelity Mut. Ass'n, 103 Iowa,

276. And the knowledge of Flynn and Spangler, who were both engaged in securing the plaintiffs' application, was the knowledge of the defendant company, and would estop it from insisting upon the invalidity of the policy when issued because of the statement in the application that the property was not incumbered. *Padron v. Century Fire Ins.*

2. INSURANCE:
application:
negligence:
fraud:
estoppel.

Co., 142 Iowa, 199; *Chismore v. Insurance Co.*, *supra*; *Wensel v. Insurance Co.*, 129 Iowa, 295.

This rule is conceded by the appellant, but it is insisted that the clause in the application and in the policy whereby the applicant for insurance agreed to accept the

3. **SAME:**
breach of
condition:
forfeiture:
estoppel.
policy issued upon the application, or return
the same at once to said company if not in
accordance with his statements, takes the
case out of the above class, and that the rule

case out of the above class, and that the rule governing therein is not applicable here. It is said that the agreement to accept the policy or return it at once if not in accordance with the applicant's statements constituted a preliminary contract between the plaintiffs and the defendant which was carried into and became a part of the policy; that it was a distinct and independent undertaking on the part of the assured in no way relating to the subject of insurance; that the assured is bound to know his express independent agreements; that he neglects to do so at his peril; that whether he has or has not made true statements, and whether the soliciting agent has or has not correctly written his answers and statements, have nothing whatever to do with the independent contract to read his policy and return it if not correct. The substance of the appellant's contention is that the assured agreed to read the policy and the application attached thereto, and that the policy should be returned if it was found that untrue answers appeared in the application. In other words, it is claimed that the assured undertook to protect the defendant against any waiver or estoppel which he might himself otherwise urge on account of the knowledge of the defendant's agents. Or, to put it in a still different form, the plaintiff agreed to protect the insurer against the mistakes or rascality of its own agents. Corporations can do business only through officers or agents, and any notice or knowledge imparted to an officer or agent authorized to receive the same is actually

imparted to the corporation. The contract relied upon makes no distinction between the "actual" and what the appellant terms the "constructive" knowledge of the defendant, and, if held enforceable, it would require the assured to examine his policy to protect the corporation against the errors of its own officers and agents, no matter what the position held by them. It would also require the assured to protect himself against such fraud and error without the right to waive the reading for his own protection. It is undoubtedly true that parties should ordinarily be permitted to make their own contracts, and we are not disposed at this time to pass on the validity of the one in question, for reasons which we shall state in this connection. If it be conceded to be valid, a failure to comply therewith does not render the contract of insurance void. The untrue statements or answers which would make the policy void are evidently the untrue statements and answers of the applicant, and not of the defendant or its agent. It is possible that the assured might be estopped from claiming that the answers were not correctly recorded by the agent; but an estoppel must be pleaded to be relied upon, and there is nothing of the kind here.

We need not now determine what the defendant's rights may be in the case of failure to comply with the agreement under consideration. What we now decide is that a failure to comply therewith does not render the contract of insurance void or forfeit the plaintiffs' rights thereunder.

We find no reversible error in the ruling on the introduction of testimony.

The judgment is right, and it is *affirmed*.

STATE OF IOWA v. D. C. O'NEIL, Appellant.

Intoxicating liquors: STATUTES: PROHIBITED ACTS: EFFECT OF HOLDING STATUTE UNCONSTITUTIONAL. Code, section 2382, as amended, prohibiting persons from soliciting or accepting orders for the purchase, sale, shipment or delivery of intoxicating liquors, was originally held unconstitutional by the Supreme Court of this state. Later the Supreme Court of the United States in another case declared the statute to be valid and our court subsequently followed that decision, overruling its own prior decisions.

Held, in this action that defendant could not be prosecuted for the doing of acts prohibited by the statute after it was declared invalid by our court and prior to the later determination holding the statute valid.

Deemer, C. J., Sherwin and Weaver, JJ., in concurring opinions.

Appeal from Wayne District Court.—Hon. H. M. TOWNER, Judge.

MONDAY, MAY 16, 1910.

DEFENDANT was accused before a justice of the peace of the crime of soliciting, taking, and accepting orders for the purchase, sale, and shipment of intoxicating liquors. The case was tried on an agreed statement of facts, and resulted in defendant's conviction. He thereupon appealed to the district court, where the defendant filed a motion for judgment upon the agreed facts. This motion was overruled, and defendant, pleading guilty after the overruling of his motion, was again convicted for the offense charged. He then appealed to this court.—*Reversed.*

Porter & Greenleaf, for appellant.

VOL. 147 IA.—33.

H. W. Byers, Attorney-General, and *Charles W. Lyon*, Assistant Attorney-General, for the State.

McCLAIN, J.—An agreed statement of facts filed on the trial before the justice of the peace was the basis of the finding of the district court that defendant in October, 1908, solicited, accepted, and took from various persons orders for the purchase by them and sale and shipment to them of intoxicating liquors from and by a certain brewing company in Kansas City, Mo., said orders being subject to the approval of said company, and that the liquors so ordered were to be shipped directly to the persons named from the place of business of said company. Defendant's motion for judgment in his favor, which was overruled, recited that the acts charged were not criminal under the law of this state at the time of their commission, and, further, that the statute of the state making such acts criminal is in violation of the Constitution of the United States as an interference with the clause thereof relating to interstate commerce and statutes on that subject passed by Congress. The acts with which defendant was charged were in violation of the provisions of Code, section 2382, as amended by Acts 28th General Assembly, chapter 74 (Code Supp., section 2382), prohibiting any person from soliciting, taking, or accepting "any order for the purchase, sale, shipment or delivery of any (intoxicating) liquor." In the case of *State v. Hanaphy*, 117 Iowa, 15, followed in *State v. Bernstein*, 129 Iowa, 520, decided, respectively, in 1902 and 1906, this statute was held unconstitutional, as in violation of the interstate commerce clause of the federal Constitution. In 1909 this court, relying upon the decision of the Supreme Court of the United States in the case of *Delamater v. South Dakota*, 205 U. S. 93 (27 Sup. Ct. 447, 51 L. Ed. 724), decided in 1907, reached the conclusion that its previous holding that the statute was in violation of the federal Constitution was

erroneous, and expressly overruled the two cases in which that conclusion had been announced, and sustained a judgment enjoining the maintenance of a place for carrying on the business of soliciting, taking, and accepting orders for the purchase, sale, and shipment of intoxicating liquors for and on behalf of a corporation located and doing business in another state as a nuisance. *McCollum v. McConaughy*, 141 Iowa, 172.

It will be noticed that the acts charged as against this defendant (and in fact also the filing of the information before the justice of the peace) were after the Supreme Court of this state had held the statute to be unconstitutional, and also after the decision of the Supreme Court of the United States in a somewhat similar case from South Dakota sustaining the validity of such a statute as against the contention that it was in violation of the federal Constitution, but prior to the action of this court in reversing its prior decisions in reliance on the later decision of the Supreme Court of the United States. The contention for defendant is that the decision of this court sustaining the constitutionality of the statute should not be given a retroactive effect, and defendant should not be punished for acts which according to the prior decisions of the Supreme Court of this state were lawful.

It is, of course, well settled that a statute which has been held unconstitutional either *in toto* or as applied to a particular class of cases is valid and enforceable without re-enactment when the supposed constitutional objection has been removed, or has been found not to exist. That was the holding in *McCollum v. McConaughy, supra*, and is not now questioned. See, also, *Pierce v. Pierce*, 46 Ind. 86. And the conviction below was proper, unless some benefit is to be given to defendant of the fact that, when the acts were committed, the latest announced decision of this court was to the effect that the statute was unconstitutional, and therefore not enforceable. It is only by

analogy, applying the rule of precedent and not of adjudication, that the decision in one case becomes in any sense the law in another case. The analogy may be so complete that the reasoning of the one case necessarily points out the conclusion to be reached in the other, and, if so, the court feels bound to bow to its previous decision, unless it is made to appear that it is so manifestly erroneous that it should be overruled. If overruled, its force as a precedent ceases, and the later decision becomes a precedent. The analogy, however, may be incomplete, and then it is for the court to determine in the subsequent case whether the reasoning of the prior case is applicable under circumstances in some of which the cases are similar, and in others dissimilar. It is not the function of a court to lay down the law for future cases, but to announce the law for the case which it is deciding. It is an important function of an appellate court to so announce its reasons for decision that they may be understood and applied with reference to subsequent cases which are likely to arise, but no court can attempt to anticipate by announcement what the law will be found to be in a case in some respects dissimilar which may subsequently arise. Therefore, as has often been said, there is no vested right in the decisions of a court, and, under the clause in the federal Constitution prohibiting any state from passing any law impairing the obligation of contracts, the Supreme Court of the United States has uniformly held that the change of decisions of a state court does not constitute the passing of a law, although the effect of such change is to impair the validity of a contract made in reliance on prior decisions. *National Mut. B. & L. Ass'n v. Brahan*, 193 U. S. 635 (24 Sup. Ct. 532, 48 L. Ed. 823); *Central Land Co. v. West Virginia*, 159 U. S. 103 (16 Sup. Ct. 80, 40 L. Ed. 91). And see *Storrie v. Cortes*, 90 Tex. 283 (38 S. W. 154, 35 L. R. A. 666); *Swanson v. Ottumwa*, 131 Iowa, 540; *Lanier v.*

State, 57 Miss. 102. It is also quite clear that the change in the decisions of a court of a state does not violate the prohibition found in the same clause of the federal Constitution against the making of *ex post facto* laws.

From the conclusion that in a constitutional sense there is no vested right in reliance on decisions of the court as precedent, and that one who is brought into court for a violation of law can not sustain himself on the mere plea that in some other case which he thought to be analogous the court rendered a decision which, if applied as he thought it would be applied, would result in exculpating him from wrong, it does not necessarily follow that the court can not take into account as a controlling consideration in reaching the conclusion as to the justice of a case that the party charged with wrongful conduct relied reasonably and in good faith upon decisions of the courts in determining whether a wrong was committed. The Supreme Court of the United States, while recognizing its general obligation to follow the decisions of the courts of the state in which a contract is made in determining its validity, has held that it will not recognize a change of rule in a state made by judicial decision where the effect of such change is to render invalid contracts which according to the views previously expressed by the state courts at the time the contracts were made were valid. *Gelpcke v. City of Dubuque*, 1 Wall. 175 (17 L. Ed. 520); *Thompson v. Lee County*, 3 Wall. 331 (18 L. Ed. 177); *Douglass v. Pike County*, 101 U. S. 677 (25 L. Ed. 968); *Center School Tp. v. State*, 150 Ind. 168 (49 N. E. 961). In *Muhlker v. New York & Harlem R. Co.*, 197 U. S. 544 (25 Sup. Ct. 522, 49 L. Ed. 872), the judges whose views on this point are expressed in the opinions filed were equally divided on the question whether one acquiring property in reliance on decisions of the courts of the state relating to his rights in an abutting

street had a vested right as against a subsequent change of decision in the state courts. These cases are cited, not as indicating any constitutional duty on the part of the courts of a state to protect a litigant in rights which he in good faith supposed he had already acquired by reason of previous decisions of the same court in other cases, but for the purpose of illustrating the extent to which a court may properly go in administering the law for the purpose of effectuating justice; that is, for the purpose of rendering such decision as shall appeal to intelligent and fair-minded people as right and proper. Courts have always taken such considerations into account in the enforcement of legislative enactments. Before there was any separate equity jurisdiction, and when the term equity was used as a mere synonym of equality and justice, the courts interpreted statutes with a view to their equity, and not merely in accordance with their strict terms; so that the case might be within the equity of a statute, although not expressly covered by it, and, *vice versa*, the statute might be held not applicable in its equity, although its strict terms covered the case. The term "equity of a statute" has fallen into disuse since the establishment of a system of equity jurisprudence, but the courts have not ceased in either branch of their jurisdiction to give consideration to the general purpose of the lawmaker as furnishing a guide to interpretation. See Dr. Hammond's note in his edition of Lieber's Hermeneutics, page 283. This again is but an illustration of the effort the court will properly make to do justice in a broad sense. In criminal cases, where the life or liberty of an individual is involved on one side, and the enforcement of law in the interest of the public welfare on the other, no private right of contract or property being imperiled by liberality of construction, the courts go further than in civil cases to recognize the common judgment of humanity as to what is right and just, and they allow

many exceptions to statutory definitions of what shall constitute a crime. For instance, in this state, although there is no statutory recognition of a coverture as a defense on the part of a married woman for a crime committed in the presence of her husband, we have said that the common-law exception in that respect is applicable. *State v. Fitzgerald*, 49 Iowa, 260; *State v. Kelly*, 74 Iowa, 589; *State v. Harvey*, 130 Iowa, 394.

And it is the general rule in all the states of the Union, even those in which the criminal law is codified, to recognize infancy and insanity as relieving from the punishment prescribed by statute for criminal offenses as they were recognized at common law, although such defenses are not allowed under any express statutory provision. The assumption is that even the statutory criminal law is to be administered in accordance with the general principles of right and justice recognized in the common-law system. 1 Bishop, New Criminal Law, section 35. In the determination of the criminality of an act even under the statutory definition, the intent is a material consideration. It is the absence of criminal intent which constitutes the basis of the defenses of infancy, insanity and coverture. Ignorance and mistake are also recognized in the same category, but here enters a question of public policy. One who is bound to obey the law ought not to be allowed to say that he was ignorant of it. He may show as a defense that he was mistaken as to a fact which, if it had been as he supposed it to be, would have rendered his act lawful, but he can not say that if the law had been as he supposed it to be, his act would have been lawful and he should not be punished. This principle of public policy has become crystallized into the maxim, "Ignorance of the law excuses no one," and as applied to the present case, it might well be said, if we followed this maxim, that defendant is not to be excused because he did not know the law, that is, did not know that the

previous decisions of this court holding the statute which he was violating to be unconstitutional were wrong and the statute was in fact valid and operative. As between conflicting rights, we might well refuse to allow any impairment of so well settled a principle, and hold that parties act at their peril as to what the law shall be decided to be. But as already indicated, in a criminal case there is no such imperative obligation, for after all the punishment of crime is a matter of public concern only and we think that it would strike any reasonable and fair person as manifestly unjust that one should be adjudged criminal in having done an act not morally wrong, but only wrong because prohibited by statute, that is, an act *malum prohibitum* and not one *malum in se*, relying upon the decisions of the highest court in the state holding such statute to be wholly invalid because in excess of the power of the Legislature to enact it.

In this connection it is to be noticed that the decisions of courts as to the constitutionality of a statute stand on somewhat different ground than those relating to the common law or the interpretation of statutes, as applied to particular cases. The function of determining whether a statute is invalid because in excess of the legislative power is one peculiar to our system of government, and unknown in other jurisdictions in which the common law prevails. It is true that such an adjudication is made in a particular case. Although the power to be investigated is that of the legislative department itself which can not be a party so as to be bound by any judicial decision, nevertheless the courts discuss such question when it arises, and decide the matter not only for the purpose of determining the rights of particular parties, but with reference to the effect of the decision upon the law of the state. A statute unconstitutional properly remains on the statute books as a part of the written law, but those who are bound to obey the law may, we think, reasonably

take into account the decisions rendered by the courts in the exercise of their peculiar function of passing upon the constitutionality of the statutes in determining what the law of the state really is. To the ordinary mind it would smack of absurdity to say that defendant ought to have known that the statute was constitutional, and would in case he violated it be enforced against him, although the Supreme Court of the state had fully considered the validity of the statute as against the claim that it was unconstitutional, and had unanimously held that it was in excess of state legislative power as to its entire subject-matter, and therefore invalid. Under such circumstances, it is plain that there should be some relief to defendant from punishment, for the very purpose of punishment is defeated, if unreasonably and arbitrarily imposed. Respect for law, which is the most cogent force in prompting orderly conduct in a civilized community, is weakened, if men are punished for acts which according to the general consensus of opinion they were justified in believing to be morally right and in accordance with law. If we should sustain the conviction, we would do so in the belief that the case was one in which executive clemency ought to be exercised. But is it quite fair to throw upon the executive the responsibility of relieving from punishment on account of the very nature of the act committed which is made apparent to this court, and its nature as being innocent or guilty appears to depend upon the effect to be given to the decisions of this court? We think we would be shirking our responsibility if we should leave it to the executive to do what we believe to be manifest justice in this case, and should stigmatize the defendant with a conviction for crime when as it appears he was innocent of any real wrong. We think the real question as to the guilt of defendant is to be settled by referring to the doctrine of criminal intent, which has always been held to be of the essence of a crime. 1 Bishop, New

Criminal Law, sections 205, 285-291b. And justifiable ignorance or mistake has always been taken into account in determining the criminality of the act. 4 Blackstone, Commentaries, 27; 1 Bishop, New Criminal Law, sections 292-312; *Regina v. Prince*, L. R. 2 C. C. 154. For reasons already pointed out, mere ignorance of law does not excuse, and even ignorance of fact which the statute expressly or impliedly makes it the duty of one acting in reference to the subject-matter regulated by the statute to know and with reference to which he is required to act at his peril will not excuse him. But even as to these strict rules there are necessary exceptions. If a mistake of fact is due to mistake of law, so that it appears there is no guilty mind, punishment should not be imposed. *Rex v. Hall*, 3 Carr. & P. 409 (14 E. C. L. 635); *Regina v. Reed*, 1 Carr. & M. 306 (41 E. C. L. 170); *People v. Powell*, 63 N. Y. 88; *People v. Husband*; 36 Mich. 306; *Commonwealth v. Stebbins*, 8 Gray (Mass.) 492. And no matter how stringently the statute may impose the duty of knowing the facts on which the defendant has relied in a course of conduct that is prohibited, save under certain prescribed conditions, the common-law exceptions which relieve on account of lack of criminal intent due to infancy, insanity, coverture, or necessity are recognized. *State v. Cutter*, 36 N. J. Law, 125; *The Brig William Gray* (U. S. C. C.), 1 Paine 16 (Fed. Cas. No. 17,694). These cases are cited not as directly in point for the solution of our present difficulty, but as illustrations of the fact that courts must, especially in the administration of the criminal law, make exceptions in the interest of justice and public policy to rules which it is very essential to maintain in ordinary cases. An exception to the rule that every one is required to know the law is justified, we believe, when, as to the validity of a statute on constitutional grounds, a person has relied upon the expressed

decisions of the highest court in his state. We do not believe such exception to be against public interest, but rather in the furtherance of justice. This question seems not to have often arisen so as to have been considered in courts of last resort, but we have support in the conclusion we have reached in the cases of *State v. Bell*, 136 N. C. 674 (49 S. E. 163), and *State v. Fulton*, 149 N. C. 485 (63 S. E. 145).

That our conclusion in this case may not be misapprehended and relied upon in support of propositions to which we have no disposition to yield consent, we desire to emphasize the following controlling conditions. This is a criminal case, and therefore involves no conflicting claims as to contractual or property rights. The defendant may be presumed to have acted with knowledge of the fact that the statute now invoked as rendering illegal an act not otherwise wrongful or immoral had been expressly held by this court in cases prosecuted under public authority to be unconstitutional because in excess of legislative power.

The judgment of the trial court is *reversed*.

DEEMER, C. J. (concurring).—While concurring in the result reached, the case is so peculiar in its facts and the principles upon which it is decided by the majority opinion, so important, that I deem it my duty to express my views thereon in a separate opinion. I am constrained to do this largely because of the fact that it is an illustration of the truth of Lord Campbell's exclamation of many years ago, that "hard cases must not make bad law." Some things are said in the majority opinion with which I fully agree, but there are other statements therein which I can not approve, and which I think will rise to plague us in the future if they be adopted without dissent. The majority make the decision turn, as I understand it, upon the thought that defendant had no criminal

intent, and for that reason should not be punished for his violation of a statute which to my mind involves no question of intent, other than the doing of the prohibited act. I do not believe that this is sound.

Again, the opinion seems to proceed upon the theory that there is an implied exception in this statute which the courts should recognize. I do not believe that this is true.

Moreover, ignorance or mistake of law seems to be thought of some merit in deciding the question before us. I fear that the introduction of this principle into the case at bar is fraught with much danger. I must especially dissent from the statement in the opinion that the real question as to the guilt of the defendant is to be settled by referring to the doctrine of criminal intent. The statement in the opinion that "if a mistake of fact is due to a mistake of law, so that it appears there is no guilty mind, punishment should not be imposed," I can not agree to this unless the statute in question in some way makes intent, either general or specific, an element of the offense.

I do not like that part of the discussion in the opinion which treats of the effect to be given judicial opinions, particularly where they involve constitutional questions, or relate to the construction of statutory enactments. I think the case may be decided and properly bottomed upon two well-settled principles. (The first one is that a change of judicial decision involving the constitutionality of an act or construing an act of the Legislature should, like an act emanating from the lawmaking power, be given a prospective rather than a retrospective or retroactive operation; second, the Constitution provides that "excessive fines shall not be imposed and cruel and unusual punishment shall not be inflicted." See section 17, art. 1. My own convictions regarding the effect of a change in judicial decisions, as applied to contracts, are fully expressed in the case of

Swanson v. City of Ottumwa, 131 Iowa, 540, and need not be elaborated here. I need only quote the following from that opinion: "We are inclined to the view that there is nothing in the Constitution which forbids a change of judicial opinion, except it be with reference to a particular statute, although we must confess that there are some strong cases to the contrary. As supporting our view, see *Storrie v. Cortes*, 90 Texas, 283 (38 S. W. 154, 35 L. R. A. 666); *Center School Tp. v. State*, 150 Ind. 168 (49 N. E. 961); *Land Co. v. Hotel*, 134 N. C. 397 (46 S. E. 748)." It will be noticed from this extract that, if the decision be with reference to a particular statute, there may be a violation of the constitutional limitation if the change of judicial opinion be with reference to that particular statute. It is quite fundamental, I think, that the judicial construction of a statute becomes a part of it, and, as to rights which accrue afterwards, it should be adhered to for the protection of those rights. As said in Sutherland on Statutory Construction, section 319: "To divest them by a change of the construction is to legislate retroactively. The constitutional barrier to legislation impairing the obligation of contracts applies also to decisions altering the law as previously expounded, so as to affect the obligation of existing contracts made on the faith of the earlier adjudication." As further supporting this view, see *Green v. Neal*, 31 U. S. 291 (8 L. Ed. 404); *Shelby v. Guy*, 11 Wheat. 368 (6 L. Ed. 497). In the case of *Ohio Ins. Co. v. Debolt*, 16 How. 432 (14 L. Ed. 997), Chief Justice Taney said: "That the sound and true rule was that, if the contract when made was valid by the laws of the state as then expounded by all the departments of its government, and administered in its courts of justice, its validity and obligation can not be impaired by any subsequent act of the Legislature or decisions of its court altering the construction of the law." In *Douglas v. Pike County*, 101 U. S. 677 (25 L. Ed. 968),

it was held that: "The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment." The following cases also support this doctrine: *Green County v. Conness*, 109 U. S. 104 (3 Sup. Ct. 69, 27 L. Ed. 872); *Olcott v. Fond du Lac County Sup'r's*, 16 Wall. 689 (21 L. Ed. 386); *Fairfield v. Gallatin County*, 100 U. S. 52 (25 L. Ed. 546); *Carroll County Sup'r's v. United States*, 18 Wall. 71 (21 L. Ed. 771); *Gelpcke v. Dubuque*, 68 U. S. (1 Wall.) 206 (17 L. Ed. 525). In Endlich on Interpretation of Statutes, section 363, it is said: "Judicial interpretation of a statute becomes a part of the statute law, and a change of it is, in practical effect, the same as a change of the statute." See, also, as sustaining this doctrine, *Ray v. Natural Gas Co.*, 138 Pa. 591 (20 Atl. 1065, 12 L. R. A. 290, 21 Am. St. Rep. 927); *Walker v. State*, 12 S. C. 271; *Lyon v. Richmond*, 2 Johns. Ch. (N. Y.) 51; *County Com'r's v. King*, 13 Fla. 463; *Edwards v. Darby*, 12 Wheat. 206 (6 L. Ed. 603); *Stallcup v. Tacoma*, 13 Wash. 152 (42 Pac. 541, 52 Am. St. Rep. 32); *Ex parte Selma R. R.*, 45 Ala. 730 (6 Am. Rep. 730); *Hall v. Wells*, 54 Miss. 301; *Herndon v. Moore*, 18 S. C. 354; *Wickersham v. Savage*, 58 Pa. 369; *State v. Comptoir Nat.*, 51 La. Ann. 1272 (26 South. 94); *Vermont Co. v. Railroad Co.*, 63 Vt. 23 (21 Atl. 262, 10 L. R. A. 565); *Opinion of Judges*, 58 N. H. 625; *Muhlker v. New York*, 197 U. S. 573 (25 Sup. Ct. 522, 49 L. Ed. 872). It must be remembered that I

am not now discussing the effect of a decision relating to that great body of the law known as the unwritten, wherein as I think, a different principle is to be applied. See further as supporting these views, *Ryalls v. Mechanics' Mills*, 150 Mass. 190 (22 N. E. 766, 5 L. R. A. 687); *Philadelphia Co. v. Ry. Co.*, 53 Pa. 20; *Packard v. Richardson*, 17 Mass. 122 (9 Am. Dec. 123). It is well settled, of course, that when the Legislature adopts a statute of another state, it adopts with it the judicial construction of that statute as interpreted by the court from which the statute is borrowed. *Trabant v. Rummell*, 14 Or. 17 (12 Pac. 56); *Pratt v. Am. Bell Co.*, 141 Mass. 225 (5 N. E. 307, 55 Am. Rep. 465). There is much ground for holding that a change of decision with reference to the interpretation of a statute is to all intents and purposes the same in its effect as an amendment of the law by means of legislative enactment. That view finds express support in *Farrow v. New England Co.*, 92 Ala. 176 (9 South. 532, 12 L. R. A. 856); *Taylor v. Ypsilanti*, 105 U. S. 72 (26 L. Ed. 1008); *Lane v. Watson*, 51 N. J. Law, 186 (17 Atl. 117); *State v. Bell*, 136 N. C. 674 (49 S. E. 163); *Center Twp. v. State*, 150 Ind. 168 (49 N. E. 961); *Lewis v. Symmes*, 61 Ohio St. 471 (56 N. E. 194, 76 Am. St. Rep. 428); *State v. Fulton*, 149 N. C. 485 (63 S. E. 145); *Haskett v. Maxey*, 134 Ind. 182 (33 N. E. 358, 19 L. R. A. 379); *Loeb v. Trustees*, 179 U. S. 472 (21 Sup. Ct. 174, 45 L. Ed. 280), and cases cited; *State v. Mayor*, 109 Tenn. 315 (70 S. W. 1031); *Gross v. Board*, 158 Ind. 537 (64 N. E. 25, 58 L. R. A. 394); *Harmon v. Auditor*, 123 Ill. 122 (13 N. E. 161, 5 Am. St. Rep. 510); *Mountain Bank v. Douglass County*, 146 Mo. 42 (47 S. W. 946); *Stockton v. Mfg. Co.*, 22 N. J. Eq. 56; *Richardson v. County*, 100 Tenn. 346 (45 S. W. 440); *Falconer v. Simmons*, 51 W. Va. 172 (41 S. E. 193).

In very many of these cases it is squarely held that

a change of judicial opinion should be given the same effect as a subsequent enactment of the Legislature; that is to say, a prospective operation in order to avoid the objections which have just been pointed out. I shall not take the time to quote from all of these; but do wish to call attention to what is said to be a well-established and well-understood exception to the rule pointed out in the majority opinion. This exception, as stated in the *Haskett* case, *supra*, is as follows: "After a statute has been settled by judicial construction, the construction becomes, so far as contract rights are concerned, as much a part of the statute as the text itself; and a change of decision is to all intents and purposes the same in effect on contracts as an amendment of the law by means of legislative action." In *Douglass v. Pike County*, *supra*, it is said: "The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contract and existing contract rights that would be given to a legislative amendment; that is to say, making it prospective, but not retroactive." In the *Hawkins* case, *supra*, it is said: "The true rule affirmed by the authorities, and the prevailing one, is to give a change of judicial construction in regard to a statute the same effect in its operation, so as not to disturb vested rights, as would be given to a legislative amendment; that is, apply the change made in the interpretation of the law so as to operate prospectively, and not retroactively." If this be the rule with reference to the interpretation of statutes in actions involving property or contract rights, and such seems to be the doctrine established by the weight of judicial decisions, there is the more reason for holding it applicable to criminal cases, particularly where the court has once held the criminal statute void and of no effect because contrary to some provision of the fundamental law. That it is within the power of the courts of this country to declare a statute inoperative and void because contrary

to the Constitution is well established, and such decisions are binding, not only upon the parties immediately involved, but upon all departments of government; indeed, upon the state itself. An unconstitutional statute is absolutely void. It is, so to speak, as so much waste paper, and according to the uniform tenor of the authorities such a determination is conclusive on every one until reversed or overruled. *People v. Briggs*, 114 N. Y. 63 (20 N. E. 820); *People v. Arensberg*, 105 N. Y. 123 (11 N. E. 277, 59 Am. Rep. 483); *People v. West*, 106 N. Y. 293 (12 N. E. 610, 60 Am. Rep. 452); *People v. Kibler*, 106 N. Y. 321 (12 N. E. 795); *Douglass v. Pike Co.*, *supra*. Such a statute may be vitalized or resuscitated by a decision overruling prior ones holding to the contrary, and this occurs although there be no reenactment by the Legislature. But, when once determined to be unconstitutional, the Legislature itself can not cure the defects in the law by declaring the act constitutional; nor has any other department of government any such power. As said, the decision is binding upon every one save the court itself. If this be true, it is little short of an absurdity to say that a decision finally upholding the statute as a valid exercise of legislative power should be given retroactive effect, and that acts done at a time when the statute had been declared void by the highest tribunal of the state must be punished because that court took a new view of the constitutional provision. (In a criminal case every one is conclusively presumed to know the law, but he is not expected to know the law better than the courts, or to know what the law will be at some future day.) A decision holding a statute unconstitutional is the law until overruled or reversed, and that decision, as we have observed, is binding upon every one. To hold that one may not do what an unconstitutional statute forbids him doing because the court may change its mind is to say that, although declared null and void by the only tribunal

having that power, such decision is of no effect, and can not be made a rule of human conduct because the court may change its mind, is in effect to deprive the court of its power to annul a statute because of its unconstitutionality. As already intimated, there is a wide distinction between cases involving the validity and interpretation of statutes and those which have to deal with the common or unwritten law, for the reason that the judicial construction of a statute is a part of the law itself. Exposition of a statute is a part of the statute. There is every reason, therefore, for holding that a decision holding a criminal statute constitutional, which had theretofore been held unconstitutional, should not be given retroactive effect. Until the decision in the *McCollum* case, cited in the majority opinion, the statute was absolutely of no effect. In *State v. Fulton*, 149 N. C. 485 (63 S. E. 146), it is said: "The judicial interpretation of a statute becomes, as it were, a part of the statute, and, if that interpretation is afterward changed or modified, the defendant should be tried under the law as it had been declared to be at the time the alleged offense was committed simply because it was the law at the time. The defendant, it is true, had no vested right in a decision of this court, but it does not follow that we should reverse our decisions, and then declare that to be criminal which we had decided was not so at the time of the commission of the alleged offense." Judge Cooley, in his work on Constitutional Limitations, says at page 188 of the third edition: "When a statute is adjudged to be unconstitutional, it is as if it had never been. Rights can not be built up under it. Contracts which depend upon it for their consideration are void. It constitutes a protection to no one who had acted under it, and no one can be punished for having refused obedience to it before the decision was made." I see no good reason for not holding that this case comes within the provision of section 21, of article 1

of the Bill of Rights, which prohibits the passage of *ex post facto* laws. An *ex post facto* law is one which makes an act innocent when done a crime. *State v. Squires*, 26 Iowa, 340. Strictly speaking, perhaps, this refers only to laws passed by the Legislature, but there is every reason for holding that it also applies to a change of judicial decisions. Decisions of courts construing statutes or declaring them unconstitutional are as much a part of the law of the land as legislative enactments. They become a part of the body of the law itself, and are not merely the evidences thereof as are decisions relating to the unwritten or common law.

II. I am very clearly of the opinion that no other basis is needed for the conclusion, which every one desires to reach in this case, than the constitutional provision against cruel and unusual punishment. These terms had a well-defined significance in England where there is no written Constitution; and in interpreting our written Constitution we are not only justified, but it is our duty, to look for the meaning of these terms as found in the decision of courts and the works of commentators published before the adoption of the Constitution. Sir William Blackstone, in treating of the nature of the laws of England (volume 1, p. 46), said: "There is still a more unreasonable method than this, which is called making laws '*ex post facto*,' when after an action, indifferent in itself, is committed, the Legislature then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it. Here it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law. He had therefore no cause to abstain from it, and all punishment for not abstaining must of consequence be cruel and unjust." Such legislation was regarded as invalid in England, where they have no Constitution, on the ground that the punishment was

cruel and unjust. The article of the Constitution referred to does not relate to laws passed by the Legislature. The broad statement is that cruel and unusual punishment shall not be inflicted. Reading this in the light of the rule as stated by Blackstone, which is well fortified by authority, there seems to be no difficulty in holding that to punish defendant for acts which were innocent when done would be both cruel and unjust. Other reasons might be given, but I believe those already suggested are sound, and should rule the decision.

I think the majority do not give sufficient weight to the decisions of courts interpreting statutes or declaring them unconstitutional; and, in an endeavor to do justice, have announced rules which are unsound in principle and not sustained by authority. The analogy between the defenses of insanity and infancy and the defense interposed here is not apparent.

I concur in reversal of the judgment for the reasons indicated.

SHERWIN, J.—I concur in the views expressed in the first division of the opinion announced by Chief Justice Deemer.

WEAVER, J. (concurring).—If the majority had announced the conclusion that under our peculiar system of government it is an implied term or condition in every statute defining crime that its penalties are not to be enforced for an act done after an authoritative judicial decision declaring the enactment unconstitutional and before a later decision by which the former is overruled and the validity of such law judicially affirmed, I should not burden the record with any expression of my individual views. The authority of a court to say that a statute is not applicable to every case apparently included within its general terms is a delicate if not dangerous one which

in the hands of a reckless judiciary would be productive of the gravest abuses, but it is nevertheless a necessary authority, and one to which the most eminent courts of the country have at times resorted. General statutes are necessarily stated in general terms to effect certain general or specific results, and it not infrequently happens that we find a case which is embraced within the literal general terms of the law, but which, we are morally certain, is not within its intent, and, when such appears to be the case, the enforcement of such law is restricted accordingly. In line with this thought I quote the following: "Acts of Parliament are to be construed as no man that is innocent or free from injury or wrong be by a literal construction punished or endangered." *Margaret Pier Co. v. Hannam*, 3 B. & A. 266. "If a literal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurdity." *State v. Clark*, 29 N. J. Law, 96. "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence. It will always, therefore, be presumed that the Legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter." *United States v. Kirby*, 74 U. S. 482 (19 L. Ed. 278). See, also, *United States v. Palmer*, 16 U. S. 631 (4 L. Ed. 471). "It is a familiar rule that a thing may be within the letter of the statute, and yet not within the statute, because not within its spirit nor within the intention of its makers. This is not a substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include the act in question, and yet a consideration of the whole legislation or of the circumstances surrounding its enactment or of the absurd results which follow from giving such broad meaning to the words makes it unreasonable to

believe that the Legislature intended to include the particular act." *Trinity v. United States*, 143 U. S. 457 (12 Sup. Ct. 511, 36 L. Ed. 226). "A thing which is within the letter of a statute is not within the statute unless it be within the intention of the makers." *Jackson v. Collins*, 3 Cow. (N. Y.) 89. See, also, *Ryegate v. Wardsboro*, 30 Vt. 746; *Murray v. Hobson*, 10 Colo. 66 (13 Pac. 921); *Commonwealth v. Kimball*, 24 Pick. (Mass.) 366; *Whitney v. Whitney*, 14 Mass. 88; *Pierce v. Emery*, 32 N. H. 508; *Austin v. State*, 22 Ind. App. 221 (53 N. W. 481). It is a fair deduction from these authorities that the very absurdity to say nothing of the essential injustice involved in punishing as criminal the violation of a statute of the state which we as the court of last resort in that state were then solemnly assuring the people was unconstitutional and void, and not entitled to their obedience, is sufficient reason for saying that the Legislature could not have intended any such application of its enactment. The road by which this result is reached is not wholly unlike the one pursued in the opinion prepared by Mr. Justice McClain. It differs, however, in this somewhat material respect, in that he emphasizes the lack of criminal intent upon the part of appellant in doing the act, while I have emphasized the absence of legislative intent to include such acts within the penalty of the statute. The latter view appeals to me as being sound, and it avoids the otherwise formidable objection raised by Mr. Chief Justice Deemer that we can not make the absence of criminal intent a controlling consideration without creating confusion in our decisions, and unsettling or weakening the authority of the precedents to which he refers. The argument by analogy from the rule which obtains where the accused is shown to be an insane person or an irresponsible infant is hardly applicable for in such cases crime is not imputed—not so much from the want of criminal intent as from the incapacity of the accused

to know or appreciate the quality of the act with which he is charged. On the other hand, I can not agree with the concurring opinion by the Chief Justice in holding that a change in judicial interpretation of a statute becomes a part of the statute or that a change in such interpretation is the "same in effect as an amendment of the law by means of legislative enactment." Whatever may have been their practice in border-line cases, our courts have always been quick to deny the charge of magnifying their authority or indulging in judicial legislation, and I think we should carefully avoid any pronouncement which may give color to criticism of that character. The rule which sometimes obtains in civil actions involving contract rights would in my judgment have a very misleading application in criminal cases, for in the former the party is relieved from the effect of the change of decision not because the erroneous holding becomes a part of the law (though that expression is often used), but because the parties are presumed to have contracted with reference to such decision which is thereby made in effect a term or condition of the agreement itself.

I am also firmly persuaded that the constitutional inhibition of cruel and inhuman punishments is not available to the appellant in this case. To make it applicable, we must assume the guilt of the accused, but hold the punishment prescribed is objectionable because it is cruel, inhuman, or one out of all reasonable proportion to the nature and quality of the offense. But, assuming guilt, a punishment is not obnoxious to the constitutional provision merely because it is severe. Fine and imprisonment are substantially the only practicable penalties which the state can impose upon offenders, and, except in extreme cases showing gross abuse of such authority the courts will not, or at least ought not, assume to say that a statute imposing them is void. The penalty which the statute imposes for the offense charged against the appellant is

a fine of not less than \$50 nor more than \$100 for the first offense, with alternative of imprisonment not exceeding thirty days in case the fine be not paid. Code, sections 2382, 2383. Assuming that appellant was punishable at all, and as I have said we must so assume before raising the constitutional objection, it is to me inconceivable that such punishment is excessive or cruel, or inhuman or unreasonable within the meaning of that provision. The books will be searched in vain for a precedent to justify that holding. To the contrary, see *State v. Tceters*, 97 Iowa, 458; *Martin v. Blattner*, 68 Iowa, 286; *State v. Huff*, 76 Iowa, 204; *Fisher v. McDaniel*, 9 Wyo. 457 (64 Pac. 1056, 87 Am. St. Rep. 981); *Luton v. Palmer*, 69 Mich. 610 (37 N. W. 701); *Commonwealth v. Hitchings*, 71 Mass. 482; *Blydenburgh v. Miles*, 39 Conn. 484; *Commonwealth v. Murphy*, 165 Mass. 66 (42 N. E. 504, 30 L. R. A. 734, 52 Am. St. Rep. 496); *Ex parte Keeler*, 45 S. C. 537 (23 S. E. 865, 31 L. R. A. 678, 55 Am. St. Rep. 785); *State v. Nelson*, 10 Idaho, 522 (79 Pac. 79, 67 L. R. A. 808, 109 Am. St. Rep. 226); *Ex parte Swann*, 96 Mo. 44 (9 S. W. 10); *Pervear v. Massachusetts*, 72 U. S. 475 (18 L. Ed. 608); *McLaughlin v. State*, 45 Ind. 328; *State v. Barnes*, 3 N. D. 319 (55 N. W. 883); *Harper v. Commonwealth*, 93 Ky. 290 (19 S. W. 737); *State v. DeLano*, 80 Wis. 259 (49 N. W. 808); *State v. Rodman*, 58 Minn. 393 (59 N. W. 1098).

In fact as I view it, there is but one tenable ground on which we can interfere with the judgment of the trial court in this case, and that is to say that the act with which the defendant is charged, though within the letter of the prohibition of the statute, is not within its purpose, reason, or intent, and is therefore not punishable. On that ground alone I would reverse.

C. D. BOYNTON v. LUCY M. SALINGER, B. I. SALINGER
ET AL., Appellants.

Vendor and vendee: FORECLOSURE OF CONTRACT: PLEADINGS: MIS-
1 JOINDER OF CAUSES. A vendor of property upon a contract for payment of the purchase price in installments, may, upon default of payment, bring his action to foreclose the contract and ask that the purchaser be required to perform, or that his interest in the property be foreclosed and sold, and the pleading will not be subject to the objection that there was a misjoinder of causes of action.

Same: PLEADINGS: TENDER OF DEED. A vendor of property in seeking to enforce payment by foreclosure of the contract need not allege tender of a deed conveying the property, nor need he tender the deed, although a different rule would prevail in a law action.

Same: PLEADINGS: FORMER OWNERSHIP: PROOF OF SAME. Although 3 the vendor of property in seeking to enforce the contract by foreclosure may have alleged that prior to execution of the contract he was the owner of the property, yet where defendant admitted the contract, alleged possession thereunder, and the only further obligation of the vendor was the execution of a deed to the property, proof of former ownership was not essential to a *prima facie* case for plaintiff.

Same: PAYMENT IN INSTALLMENTS: LIMITATION OF ACTION. Under 4 a contract for the sale of property providing that the purchase price shall be paid in installments on or before a specified date, a right of action accrues upon each installment as the same falls due, and the statute of limitation commences to run against an action thereon from that date; and unless action is instituted within ten years from that date the bar of the statute becomes effectual, even though subsequent installments are not then barred.

Same: ADVERSE POSSESSION. A vendee of property in possession 5 under a contract providing that he shall acquire title only upon performance of its conditions, can not, prior to performance or prior to a time when enforcement of the conditions of the contract is barred by limitation, assert a claim of adverse possession against his vendor.

Same: PAYMENT: APPLICATION. Under a contract for the purchase 6 of property and payment in installments, payments made without application by either party prior to the time when part of the installments are barred, can not be so applied by the parties after suit is commenced to foreclose the contract; but equity will make the application on the installments first maturing, although barred.

Same: FORECLOSURE OF CONTRACT: COSTS. Where a contract for the 7 sale of real estate does not provide for the cost of an abstract of title in case of foreclosure of the contract, the expenses of the same will not be taxed as a part of the costs.

Same: FORECLOSURE OF CONTRACT: PROOF OF TITLE. Where an action 8 to foreclose a non-negotiable contract for the sale of real property is brought in the name of one of several vendors named therein, the presumption is that all of the vendors continue to be the owners of the contract; and although plaintiff alleges his ownership, still, where defendant demands strict proof of the allegation he is required to prove his interest.

*Appeal from Carroll District Court.—HON. Z. A. CHURCH,
Judge.*

MONDAY, MAY 16, 1910.

PLAINTIFF alleged his former ownership of lots nine and ten in block three of Carroll, and that on September 15, 1897, the parties hereto entered into an agreement by the terms of which C. D. Boynton and Cora B. Boynton undertook to convey said lots to Lucy M. Salinger, upon payment of \$4,000 in payments as specified; that the first two installments and several sums had been paid, and prayed for judgment in the sum of \$4,188.33, with interest at seven percent per annum from June 15, 1908. The defendant answered by admitting the execution of the contract as alleged, demanding strict proof of plaintiff's ownership thereof, denying that the contract, save the credits alleged, was wholly unpaid, electing to have payments credited on the \$1,000 last payable, and averred open, notorious, and adverse, continuous possession of the prop-

erty since September 15, 1897, and that all payments save the last were barred by the statute of limitations. On hearing, the court entered a decree of foreclosure as prayed. The defendants appeal.—*Reversed and remanded.*

L. H. Salinger, for appellants.

W. C. Saul, for appellee.

LADD, J.—The contract for the sale of the lots, with house thereon and furniture therein, was executed September 15, 1897. By its terms, upon the payment of \$4,000 as therein provided with interest, C. D. and Cora B. Boynton agreed to make to Mrs. Salinger “a full warranty deed to said premises covenanting therein against all liens and incumbrances.” Two hundred dollars of the price was paid upon the execution of the contract, and \$800 November 1, 1897. The contract in fixing the time for payment of the remainder of the purchase price reads: “\$1,000 more on or before January 1, 1898; \$1,000 more on or before March 1, 1898, and the remaining \$1,000 on or before July 1, 1898.” The deferred payments were to draw interest at the rate of seven percent per annum and “the said lots are holden to secure” such payments. The plaintiff prayed judgment for the deferred payments, with interest, and that the defendant be “required to perform her contract, or that her interest in said property be foreclosed.”

This was not open to the criticism of demanding different and independent remedies; i. e., specific performance

1. VENDOR AND
VENDEE:
foreclosure
of contract:
pleadings:
misjoinder
of causes.

and foreclosure. Performance by defendant would have been by payment, and foreclosure is the remedy provided for enforcing this. The prayer did no more than demand that defendant be required to perform by paying the amount due, and that upon failure so to

do, such performance be enforced through foreclosure proceedings, and therein was in strict compliance with section 4297 of the Code, which authorizes the vendor in such case to "file his petition asking the court to require the purchaser to perform his contract or to foreclose and sell his interest in the property." Therein the vendee is to be treated as the mortgagor of the property, and his rights therein foreclosed in a similar manner. Section 4298, Code. Upon ascertaining the amount due, the vendee may pay or allow the property to be disposed of to satisfy the amount owing. There was no error in ruling that there was no misjoinder of causes of action.

II. Appellants challenge the sufficiency of the petition in that it did not allege the tender of a deed conveying the property as a condition precedent to the maintenance of the action, nor tender such deed.

2. SAME: pleadings: tender of deed. Until full payment the vendors were under no obligation to convey, and for this reason such allegations were not necessary. *Stevenson v. Polk*, 71 Iowa, 278; *Grimmell v. Warner*, 21 Iowa, 11. Had the case been at law a different rule would prevail, for payment ought not to be exacted without requiring the execution of the conveyance as a condition, and such provision may be and is proper to be incorporated in the decree of foreclosure. *Wall v. Ambler*, 11 Iowa, 274.

III. The petition alleged that prior to the execution of the contract plaintiff was owner of the lots, and exception is taken to the decree because of the omission 3. SAME: pleadings: former ownership: proof of same. to introduce proof of title. Suit was based on the stipulations of the contract and their breach. The defendant admitted the execution thereof, and that she had taken possession thereunder. All exacted of the vendors thereafter was the execution of a deed such as stipulated; and, even though plaintiff may have alleged former ownership of the lots, this was

not an element essential to be established in order to make out a *prima facie* case for relief as prayed.

IV. This action was begun by the service of an original notice, June 29, 1908, more than ten years after the payments to be made January 1 and March 1, 1898, be-

came due, but a few days before the maturity of the payment of July 1st of that year. The defendant pleaded the statute of limitations in bar of all save the last payment.

4. SAME:
payment in
installments:
limitation
of action.
In this state the mortgage is an incident to the debt, and an action to foreclose is barred by the statute of limitations if then the statute has run against the debt. *Newman v. De Lorimer*, 19 Iowa, 244; *Gower v. Winchester*, 33 Iowa, 308; *Smith v. Foster*, 44 Iowa, 442. The same rule prevails in an action to foreclose a contract or bond for the sale of real estate; that is, if an action on the payments stipulated is barred, the statute may be successfully pleaded against an action to foreclose. *Day v. Baldwin*, 34 Iowa, 380. The point was not involved in *Burdick v. Wentworth*, 42 Iowa, 440, nor in *Austin v. Wilson*, 46 Iowa, 363, relied on by appellee. Both were actions of right, and all held was that in such actions the legal title will prevail over equitable interests. Our inquiry then may be limited to ascertaining whether the statute of limitations has run against any part of the purchase price claimed. Where a note or bill is made payable in installments, the statute attaches, and begins to run upon each installment as it becomes due, though the rule seems to be otherwise with reference to interest payable annually. *Wood*, Limitations, section 126; *Bush v. Stowell*, 71 Pa. 208 (10 Am. Rep. 694); *Burnham v. Brown*, 23 Me. 400; *Heywood v. Perrin*, 10 Pick. (Mass.) 228 (20 Am. Dec. 518); *Napa Valley Wine Co. v. Daubner*, 63 Minn. 112 (65 N. W. 143). This, also, is true of other contracts. *Miles v. Kelly* (Tex. Civ. App.), 25 S. W. 724; *Davis v. Herrington*, 53 Ark. 5 (13 S. W. 215); *Wood*

v. Cullen, 13 Minn. 397 (Gil. 365); *De Uprey v. De Uprey*, 23 Cal. 352; *Morrill v. County* (Tex. Civ. App.), 33 S. W. 899; *Tucker v. Randall*, 2 Mass. 283; *Foxell v. Fletcher*, 87 N. Y. 480; *Bartel v. Mathias*, 19 Or. 482 (24 Pac. 918); *Cocke v. Stewart*, 2 Tenn., 232.

At the common law, an action of debt might not be maintained until all the installments had matured. 13 Cyc. 411. But in other forms of action, a different rule prevailed. In *Bush v. Stowell*, *supra*, the suit was in assumpsit on a joint promissory note for an amount specified, "one-fourth of the principal and the interest on the whole sum, on the first of June next and the balance in three equal yearly payments," and the court, speaking through Sharswood, J., said: "Lord Coke announced the distinction between actions of debt and of covenant or assumpsit upon an agreement to pay a sum of money by installments, which has been recognized and followed since: 'If a man be bound in a bond or by contract to another to pay a hundred pounds at five several days, he shall not have an action of debt before the last day be passed.' 'But if a man be bound in a recognizance to pay a hundred pounds at five several days, presently after the first day of payment, he shall have execution upon recognizance for that sum, and shall not tarry till the last be passed, for that it is in the nature of several judgments.' 'And so it is of a covenant and promise; after the first default, an action of covenant or an action upon the case doth lie, for they are several in their nature.' Coke Littleton, 292b. Lord Loughborough reviewed all the law on this subject in *Rudder v. Price*, 1 H. Bl. 547, in which it was held that an action of debt will not lie on a promissory note, payable by installments, till the last day of payment be passed. He shows that prior to the case of *Cooks v. Whorwood*, 2 Saund. 337, it was the uniform course, where an action of assumpsit was brought before all the installments were due, to allow a recovery

in damages for those still to accrue and become due, upon the notion that after a judgment on the contract no further recovery could be had. *Beckwith v. Nott*, Cro. Jac. 504; *Peck v. Ambler*, Dyer, 113, and note; *Milles v. Milles*, Cro. C. 241. But in *Cooks v. Whorwood*, which was assumpsit to perform an award to pay money in installments, it was objected that all the days of payment were not past; but the court of King's Bench, Sir Matthew Hale being then Chief Justice, was clear that the action might be brought for such money only as was due at the time of bringing the action, and the plaintiff could recover damages accordingly; and when another sum of the money awarded should become due, the plaintiff might commence a new action for that also, and so *toties quoties*. The law must now be considered as settled in conformity to this doctrine." The action on three installments was held to be barred for the reason that the action was in assumpsit, and not in debt. We are no longer concerned with the subtle distinctions between the different forms of action at common law which our ancestors seemed to delight in, for all forms of action have been abolished in this state, and all essential is that the pleader make a plain statement of the facts, without legal conclusions, upon which he relies. Section 3426, Code; *Mentzer v. Telegraph Co.*, 93 Iowa, 752.

Of course, the grounds for or causes of action remain as before, the procedure alone having been changed, and the remedy is no longer denied for no other reason than that one form of action has been chosen by the pleader instead of another. That an action of debt might not have been maintained at the common law on an instrument payable in installments, before all of these had matured, no longer will justify its abatement as prematurely brought, if an action in assumpsit or on the case might have been maintained thereon. And so in a suit like this, it was decided long ago that, in order to maintain

an action on an installment of the purchase price, it is not necessary to wait till all the installments have become due. *Tupple v. Viers*, 14 Iowa, 515. And this is in harmony with the decision with reference to the foreclosure of mortgages; suits therefor being maintainable where the debt is payable in installments, though one or more of them have not matured. 2 Jones on Mortgages, section 1459; *Todd v. Davey*, 60 Iowa, 532; *Poweshiek Co. v. Dennison*, 36 Iowa, 244. In the first of these cases, a sale under a foreclosure of the mortgage on one installment due was held to exhaust the mortgagee's remedy against the land, following a like conclusion with reference to a sale under the foreclosure of a contract for the sale of land announced in the last, but it does not follow that a sale of part of the premises might not have been effected without discharging the mortgage or contract as to the remainder, or that had value been bid and paid at the sale, any balance might not have been retained by the court until other payments matured. 2 Jones on Mortgages, sections 1577, 1700. As against mortgagee or vendor, then, the circumstance of a cause of action accruing as each installment becomes due does not in event of maintenance of suit on each necessarily involve loss of security. A cause of action accrues upon the maturity of each installment, and recovery thereon, either at law or by foreclosure of mortgage or vendor's contract is barred by the lapse of ten years. *Bissell v. Forbes*, 1 Cal. App. 606 (82 Pac. 698); *George v. Butler*, 26 Wash. 456 (27 Pac. 263, 57 L. R. A. 396, 90 Am. St. Rep. 756); *Naves v. Ball*, 66 Neb. 606 (92 N. W. 571); Wood, Limitations, section 224. The contract fixed the purchase price at \$4,000, and provided that the vendee "shall pay party of the first part \$200 when the contract is executed, acknowledged and one of the duplicates delivered to her; \$800 more by November 1. 1897, at which time second party shall be

given possession; \$1,000 on or before January 1, 1898; \$1,000 more on or before March 1, 1898, and the remaining \$1,000 on or before July 1, 1898. All of said deferred payments coming due after possession is given shall draw interest from the time possession is given until paid at seven percent per annum. When the full \$4,000 is paid with all the interest that may accrue, C. D. Boynton and Cora B. Boynton shall make to Lucy M. Salinger a full warranty deed to said premises, covenanting therein against all liens and incumbrances. The said lots are holden to secure the payments herein stipulated for."

It will be observed that each of the last three payments were to be made on or before a specified date, that "deferred payments" were to draw interest after possession was taken, and that the security was of the "payments." Action might have been maintained on either of those falling due January 1, and March 1, 1898, at any time after the latter date; and, as this was more than ten years prior to the beginning of this suit, the plea as to these should have been sustained.

V. The parties stipulated that defendant went into possession under and by virtue of the contract November 1, 1897, and that she had since occupied the premises as a

homestead. This being so, her possession
5. SAME:
adverse
possession. when taken was consistent with, and not adverse to, the claim of the plaintiff. The vendee in such a case is not a tenant or trespasser, but a purchaser under an executory contract, which in terms acknowledges title in the vendor, and expressly stipulates the manner of divesting him thereof; i. e., by paying the purchase price. He holds in subordination to his vendor until the conditions are complied with. *Swartwout v. Johnson*, 5 Cow. (N. Y.) 74, (15 Am. Dec. 433); *Wood, Limitation*, section 259; *Bellingham Bay Land Co. v. Dibble*, 4 Wash. 764 (31 Pac. 30); *Potts v. Coleman*, 67 Ala. 221; *Long v. Kansas City Stockyards*, 107 Mo.

298 (17 S. W. 656, 28 Am. St. Rep. 413); *Avent v. Arrington*, 105 N. C. 337 (10 S. E. 991); *Jasperson v. Scharnikow*, 150 Fed. 571 (80 C. C. A. 373, 15 L. R. A. (N. S.) 1236.) But such purchaser may protect his interest by acquiring an outstanding title, even as against the vendor. *Watkins v. Holman*, 16 Pet. 25 (10 L. Ed. 873.) And in this state and Alabama it has been held that a vendee, who has purchased from a vendor and received conveyance though his vendor holds under an executory contract of purchase, may successfully interpose a plea of adverse possession against the original vendor, even though the original vendee has not fully performed. *State v. Conner*, 69 Ala. 212; *Tayloe v. Dugger*, 66 Ala. 444; *Montgomery Co. v. Severson*, 64 Iowa, 326. This is on the ground that, even though the possession of the last vendee might have been subordinate to the claims of his vendor, it may be said to have been adverse to all others. In the last case the county had contracted to sell certain swamp lands to the American Immigrant Company, and the latter had executed agreements to convey to certain purchasers upon payment of the purchase price. This having been paid and conveyances made by the company, the court held the purchaser's possession to have been adverse from its inception to any claim by the county against its vendee. As to whether the purchasers held adversely to their vendor, the American Immigrant Company, vendee of the county, was not involved in the case, though some language in the supplemental opinion might be construed otherwise. The point was not controlling in *Knudson v. Litchfield*, 87 Iowa, 111. See *Austin v. Wilson*, 46 Iowa, 362. Even though *Montgomery County v. Stevenson*, *supra*, be sound, it does not follow that a vendee may base a claim of adverse possession on a contract in pursuance of which he has entered possession, on the express stipulation that he is to acquire title only upon the performance of its conditions, the enforce-

ment of which conditions has not become barred by the statute of limitations. It is elementary that adverse possession must be accompanied with positive and exclusive claim of the entire title, and if the title claimed be subordinate to or admits the existence of a superior title, the possession will not be regarded as adverse to that title. The decisions cited and others support this conclusion; and, without further elaboration, we conclude that this defense was rightly eliminated.

VI. Several payments had been made—\$400, April 6, 1898, \$100, February 1, 1899, \$600, August 4, 1900—but these had not been applied by either party. This be-

ing so, it was too late for either to elect
6. **SAME:** payment: after suit was begun upon which install-
application. ments these payments should be applied.

Ordinarily such payments are to be applied on indebtedness first maturing, and as this appears equitable, the several amounts will be regarded as having satisfied in part the installments barred by the statute of limitations.

VII. The exception to the taxation of an abstractor's fee as part of the costs is sustained. Neither the contract

7. **SAME:** foreclosure of contract: costs. nor any statute authorized this. The section of the Code on which appellee relies relates to actions for the recovery of real property, and not to foreclosure suits.

VIII. The petition alleged the contract to be the property of plaintiff. The defendant admitted the due execution thereof, but demanded strict proof of the allega-

tion of ownership. The contract does not appear to have been introduced in evidence.
8. **SAME:** foreclosure of contract: proof of title. But it was not negotiable, and from the circumstances of its having originally belonged to the vendors therein named, it may be inferred that they continue to be owners thereof. But there was no proof that Cora B. Boynton had transferred her interests therein to plaintiff, nor of the extent of the in-

terest of each. In these circumstances a decree, if entered, must necessarily rest on presumptions which might prove contradictory to the condition of the title and the relief prove unsatisfactory to either party. As a different decree necessarily must be entered, and adequate relief may not be awarded save by making Cora B. Boynton a party plaintiff or defendant, or introducing proof of the transfer of her interest in the contract to plaintiff, we have concluded to remand the cause, with directions that plaintiff be allowed to bring in Cora B. Boynton as a party to the action, and hearing be had as to any issues raised thereby, or, if this be not done, additional evidence bearing on the ownership or transfer of the contract by either party. Thereupon a decree not inconsistent with this opinion may be entered.—*Reversed and remanded.*

R. M. STEWART v. COLFAX CONSOLIDATED COAL COMPANY,
Appellant.

Mines and Mining: DAMAGES: ADMISSION OF EVIDENCE: HARMLESS ERROR: INSTRUCTION. In this action to recover damages for the wrongful act of defendant in mining and appropriating coal under plaintiff's land, and for damage to a building situated thereon, it appeared that plaintiff had sold to defendant's grantor the coal underlying his farm, reserving the coal under one-fourth of an acre on which the building in question was situated, but that defendant disregarding the reservation mined and removed the coal from the reserved land.

Held, that as the court charged the jury not to consider as an element of damage the claim that there was no other suitable site on the farm for the building, because of the mining operations, and also limited the jury to a consideration of damages caused in mining the coal from the reserved land, and consequent injury to the building, the permission of evidence of the value of the land after mining the reserved coal, on the theory that there was no other suitable site for the building, was not prejudicial to defendant.

Held also, that evidence of loss of value to the farm because of injury to the building site, and of loss of value to the farm on the theory that after the coal had been mined under the building site there was no other suitable site for the building on the premises, was inadmissible on the question of damages.

Same: MEASURE OF DAMAGES. The measure of damages for wrong-
2 fully mining the coal in the reserved tract was the value of the coal immediately before the taking and removal of the same when considered in the light of its accessibility, the result of rightful mining operation under the contract of sale, and not the value of the coal in place regardless of facilities for removing the same afforded by the rightful mining operations, nor its value when brought to the surface and ready for market.

**Same: EVIDENCE: TRESPASS: DAMAGES: AFFIRMANCE OF RULING BY
3 EQUALY DIVIDED COURT.** Upon an equal division of the appellate court a ruling of the trial court will stand affirmed by operation of law. Under this rule the determination of the trial court that the allegations of plaintiff's petition were insufficient to permit evidence of wilful or negligent trespass by defendant in removing the coal from the reserved land, and of its value at the mouth of the mine, is sustained.

Same: GRANTS: RESERVATION: SUFFICIENCY OF DESCRIPTION. Al-
4 though the description of land reserved from the grant in this case may not have been sufficiently definite to support a conveyance, still, as the reservation had reference to a certain area of coal to be left for a support to a building situated upon the reserved tract the description was sufficiently certain to require the grantee to leave the designated amount of coal unmined, and to authorize recovery for the value of the coal taken therefrom.

Retaxation of costs: PRESUMPTION ON APPEAL. The trial court may
5 examine the transcript of evidence for the purpose of determining the cost of making the same; and it will be presumed on appeal that the lower court made a proper ruling on a motion to retax such costs, in the absence of a contrary showing, and the appellate court will not go to the certified transcript to determine the facts for itself.

*Appeal from Jasper District Court.—HON. BYRON W.
PRESTON, Judge.*

MONDAY, MAY 16, 1910.

ACTION to recover damages occasioned to plaintiff by the wrongful act of defendant in mining and appropriating from plaintiff's land the coal under one-quarter of an acre, which had been reserved from a sale by plaintiff to defendant's grantor of the coal lying under the tract of land described in said grant, and the additional damage resulting from injury to plaintiff's barn situated upon and supported by the one-fourth acre reserved in said grant. There was a verdict for plaintiff in double damages, under Code, section 2485, in the sum of \$2,064.50, and from judgment on this verdict defendant appeals, alleging errors in the rulings and instructions of the court relating to the measure of damages. The plaintiff also appeals. The defendant, having first appealed, will be treated as appellant. —*Affirmed.*

Ryan & Ryan, for appellant.

E. J. Salmon and Tripp & Tripp, for appellee.

McCLAIN, J.—In the instrument executed by plaintiff to defendant's grantor conveying the right to the coal underlying a forty-acre tract of land constituting plaintiff's homestead and on which were located the house, barn, and other improvements, occupied by the plaintiff in conducting a farm of two hundred and forty acres of which the forty-acre tract constituted a part, there was a reservation as follows: "Except one-fourth of an acre upon which the grantor's house is now situated, and one-fourth of an acre upon which the grantor's barn is now situated, and also excepting a tract extending ten feet each way from the deep well now used upon said premises." There are provisions in the instrument for the use of portions of the surface of the tract in carrying on mining operations. The right to take coal from under the other portion of the land constituting the two-hundred and forty-acre farm

was conveyed to the same grantee under a separate instrument executed a short time before the execution of the instrument in question. The action is to recover damages for mining under the barn, in violation of the reservation of one-fourth of an acre upon which the barn is situated, and the damages asked relate to the wrongful taking of the coal and the damage caused to the barn by the subsidence of the soil resulting from the mining operations. As to the measure of injury for the removal of the coal the court adopted a rule not satisfactory to either party, and plaintiff's cross-appeal may be properly considered in connection with the allegations of error made for defendant in that respect.

I. In the course of the introduction of the evidence for plaintiff testimony of a witness was received, over defendant's objection, as to the value of the entire two-hundred and forty-acre farm, and also as to the value of the forty-acre tract, respectively, before and after the mining out of the coal under the barn, under the contention for plaintiff that, after the coal was mined under the barn, that site was not a suitable site for such purpose, and that there was no other suitable site on the premises. But on a motion to strike out this evidence the court reserved final ruling, and afterwards instructed the jury not to consider as an element of damage the claim that there is no other place on the forty acres or on the two hundred and forty acres suitable for a barn site, and further limited the jury to the consideration of the damages caused in mining out the coal from the quarter acre reserved under the barn and the consequent injury to the barn itself, and he specially told the jury that, although testimony had been introduced during the trial as to different rules for the measure of damages, the jury should be governed by the rules stated to them by the court in its instructions. It is contended for appell-

1. MINES AND
MINING:
damages:
admission of
evidence:
harmless error:
instruction.

lant that the error in allowing witnesses to testify as to the value of the whole farm and the forty-acre tract alone prior to the wrongful act of defendant and subsequent thereto was not entirely cured by these instructions; but, on an examination of the record, we are satisfied that if the jury followed the direction of the court, and it must be assumed it did so, no prejudice could have resulted to the defendant from the admission of the evidence referred to, conceding that it was erroneous, or from not more specifically excluding the testimony of certain witnesses. The case is plainly not one for evidence as to the value of either the entire farm or the forty-acre tract alone before and after the wrongful act of defendant in removing the coal from under the barn. Plaintiff had for a valuable consideration sold to defendant's grantor the right to remove the coal from the entire farm, reserving only so far as is necessary for present consideration the coal under the barn. It was not the fault of defendant that other portions of the premises were rendered unsuitable for a barn site by reason of the removal of coal. Estimates of witnesses as to how much less the farm would be worth on account of the destruction of the existing barn site as a suitable place for maintaining a barn would be too remote and speculative to be of any value as a guide to the jury in the allowance of damages. We find no merit in plaintiff's contention that the court erred in not allowing this evidence to go to the jury as a basis on which to determine the damages suffered.

Laying aside the claim that the depreciation in value of the farm should have been considered, we have still to determine a controversy between counsel as to the measure of damages on the general basis on which the court allowed the case to go to the jury—that is, the basis of compensation for the coal wrongfully taken—the contention for plaintiff being that the measure of damage should be the value

2. SAME:
measure of
damages.

of the coal from the quarter acre tract as brought by defendant to the surface ready for sale, while the defendant contends that it should be the value of the quarter acre of coal lying in the vein. The court adopted a rule not satisfactory to either party, and directed the jury that "the measure of plaintiff's damages as to the coal taken from under the quarter of an acre reserved under the barn is double the fair and reasonable value of said coal in the earth or vein immediately before the taking and removal thereof took place." The contention made for defendant that the measure of damage for the wrongful removal of the coal should be its value in place, regardless of any facilities for its removal afforded by the operation of the defendant in mining the remainder of the coal, seems to us not well founded. The coal underlying a quarter-acre tract of land, with no right to mine the coal around it, would have no market value whatever, and could not be sold. The size of the tract from which the coal may be removed by the purchaser, and its accessibility from other property on which the same party has the right to mine coal, has much to do with the salability of coal privileges. Therefore the price which defendant paid per acre for the coal under the remainder of the tract would not be controlling in determining the value of the coal privilege under this particular quarter-acre tract. On the other hand, a purchaser of the coal underlying a considerable tract must take his chances as to faults in the vein and its thickness in different portions of the tract; he can not with any amount of prospecting know absolutely how much coal will be yielded by each particular acre of land. When it had been ascertained by mining on all sides of this quarter-acre reservation just what the thickness of the vein and the quality of the coal was, it acquired a value quite different from that which it would have had as a portion of the forty-acre tract before mining operations were commenced; and the fact that it was

thus rendered accessible for removal without additional expense for machinery, shafts, or entries very materially increased its value beyond that which it possessed before defendant's mine was opened and the coal in adjoining portions of the forty-acre tract had been taken out. This increased value of the coal did not belong to defendant, although it was due to defendant's mining operations, for the defendant had expressly agreed to allow it to remain as plaintiff's property. Had plaintiff and defendant negotiated specially for the purchase by defendant of the coal under this quarter-acre tract under the conditions above described, each would have properly taken into account the situation as it then existed, and the value of the coal would unquestionably have been estimated on that basis. The defendant is not in a situation, therefore, to claim that the court erred as against it in allowing the jury to consider the value of the coal for mining purposes immediately before the taking and removal took place; that is, at the time when this coal had become accessible by the mining operations of the defendant. See, as supporting this conclusion, *Livingston v. Rawyards Coal Co.*, 5 App. Cas. 25.

Plaintiff's contention, however, is that, if the taking of the coal by defendant was willful or negligent, plaintiff was entitled to its value at the mouth of the pit, ready

for sale, without deduction in defendant's favor of the cost of mining and elevation, and that the court erred in excluding evidence of willfulness or negligence on defendant's part.

3. SAME: evidence: trespass: damages: affirmance of ruling by equally divided court.

plaintiff's part, and as to the value of the coal at the mouth of the mine. The allegations of plaintiff's petition were in brief that he was the owner at the time his cause of action accrued of the land described; that defendant entered thereon for the purpose of mining and removing the coal to which it was entitled under its contract; that in removing its said coal defendant wrong-

fully broke and entered upon one-fourth acre of land upon which plaintiff's barn was situated, and which had been reserved from the mining lease, and, "without the permission or license of plaintiff, unlawfully mined, excavated, carried away, and appropriated to its own use the coal underlying the said one-fourth-acre tract of the actual value of \$1,000," and in so removing the said coal underlying said one-fourth-acre tract left no support to protect the surface of the land from subsidence, in consequence whereof said land caved in and gave way in many places, damaging plaintiff's barn located thereon and its foundation, rendering it unfit for use, and generally greatly depreciating the fair market value of the entire tract of land, of which said one-fourth-acre tract was a part, and for all the injury, including the value of the coal taken, plaintiff asked damages in the aggregate sum of \$10,000. In an amendment to his petition plaintiff alleged that the trespass complained of was willfully and knowingly done by defendant, and that the actual value of the coal mined, excavated, carried away, and appropriated by defendant, as alleged in the petition, was \$2,500. In a subsequent amendment to the petition plaintiff alleged that he was entitled to double damages for all loss and injury claimed by him by reason of the taking of the coal and undermining and injuring his land as stated and complained of in his original petition. The judges of this court are equally divided in opinion as to whether, under these allegations, plaintiff should have been allowed to offer evidence of willfulness and negligence in trespassing on the quarter acre reserved to plaintiff, and of the value of the coal at the mouth of the mine, especially in view of the provision of Code, section 2485, that "any owner or person operating a mine who, without permission, takes coal from adjoining lands, shall be liable in double damages therefor and for all expenses caused thereby." The rulings of the trial court in respect to

these questions are therefore affirmed by operation of law, as provided in Code, section 195.

II. From the language of the reservation in the sale of the coal under this tract of land it is apparent that there was some uncertainty as to how the quarter

acre under the barn should be described,
4. SAME:
grants:
reservation:
sufficiency of
description.

and what its exact boundaries should be, and counsel for defendant contend that this uncertainty was such as to deprive the reservation of any effect whatever. It may be conceded without citation of the authorities relied upon that a conveyance in like terms would be invalid; and, unless it could be reformed in some way, so as to express the exact intention of the parties, it would be ineffectual to vest title. But the reservation was of one-quarter acre of coal to support the barn, and it was immaterial to either party just what the boundaries of such quarter acre should be, so that it furnished the support required. In other words, the defendant was forbidden to remove one-quarter acre of coal, and was thereby deprived of the profit which would otherwise have accrued to it from the removal of that quantity, and the plaintiff was entitled to have that quantity of coal remain for his advantage, not as coal, but as support. Taking into account the circumstances and evident purposes of the reservation, we have no difficulty in reaching the conclusion that the trial court did not err in so instructing the jury that the plaintiff was allowed to recover the value of the coal taken from one-quarter acre of land under the barn.

III. Many other errors are assigned in behalf of the defendant, but an examination of the record shows them to be without merit. The controlling considerations in estimating the measure of damages were properly submitted to the jury, and none of the minor rulings complained of could have been prejudicial in regard to the determination of these questions.

IV. A separate appeal is prosecuted by the defendant from the action of the court in overruling its motion for retaxation of costs of the reporter's transcript of the evidence. The abstract on this separate appeal does not show what evidence was submitted to the court in connection with this motion, although plaintiff, in a denial of appellant's abstract, insists that oral evidence was heard, and denies also that the transcript itself was offered in evidence or considered by the court in determining the motion. No doubt the judge of the lower court might for himself examine the transcript for the purpose of determining the number of words contained therein, but it does not appear that he did so, and we think we are not bound to go to the transcript, which has been certified to us from the lower court, for the purpose of determining the fact. In the absence of a conclusive showing to the contrary, we must presume that the lower court made a proper ruling on the motion, and its ruling is therefore affirmed.

Finding no error in the record, the judgment is on both appeals *affirmed*.

C. J. RICHARDS, Appellant, v. MARY A. WATTS, Appellees.

Evidence: CREDIBILITY AND WEIGHT: DIRECTION OF VERDICT. The credibility of a witness and the weight to be given his evidence are questions for the jury, and a verdict ought not to be directed by the court on the ground that his examination discloses a defective memory, or that he is seemingly untruthful.

*Appeal from Polk District Court.—HON. HUGH BRENNAN,
Judge.*

THURSDAY, JUNE 9, 1910.

THE opinion states the case.—*Reversed.*

S. B. Allen, for appellant.

J. M. Parsons, for appellee.

WEAVER, J.—The petition alleges in substance that the defendant, Mary A. Watts, aiding and abetting one Marion Comegys, stole and carried away from the home of the plaintiff the sum of \$746 in gold and silver coin. The answer denies the charge. The testimony offered tends to show that plaintiff is a coal miner living in a suburb of the city of Des Moines and at the time in question had accumulated about \$930 in gold and silver. He was distrustful of banks of deposit and kept his treasure stored in a fruit jar concealed in or about his bed. Defendant lived in the same neighborhood and in her employ at this time was one Marion Comegys, a boy fifteen years of age. The fact that plaintiff had a quantity of money was known to one or two of his neighbors, but except in the story related by the boy, there is no direct testimony that defendant had such knowledge. On July 2, 1908, plaintiff's wife having been temporarily absent during the earlier part of the day and plaintiff himself being away at the mine, it was discovered on their return that a large part of the coin had been abstracted. It was learned that Marion Comegys had been seen by one or more of the neighbors in the vicinity of plaintiff's house at or about the time the money was supposed to have been stolen, and suspicion was aroused that he was the guilty party. Upon being arrested, he confessed to having taken the money, but claimed that he took it at the direction and instigation of the defendant to whom he had delivered the booty. As a witness in this case, he swears that defendant told him there was money in plaintiff's house and to go over there and hunt until he found it. When he had

consented, he says she gave him a key with which he unlocked the door of plaintiff's house, found the fruit jar in or under the bed, and took out a part of the money and went with it to the defendant, who, on ascertaining that he had not taken it all, directed him to return and get the remainder. He thereupon returned to plaintiff's house and took more of the money, but left a remnant in the jar. He further says that on taking the money to the defendant she placed it in a baking powder can and buried it in or under one of the mangers in the cow barn, and that from the moneys so received she gave him one or two gold pieces. On the following day she went with him to the city and bought him a suit of clothes and pair of shoes. On Monday an officer went to the home of defendant for the purpose of interviewing or arresting the boy, and according to his story, defendant had him conceal himself until the officer had left. Upon search of the premises no money was found, but at the place under the manger where the boy claims defendant concealed the money there was found an excavation substantially such as he described. Cross-examination of this witness developed some apparent inconsistencies in his story and he quite frequently professed forgetfulness as to some of the material details. The record as made by him seems to indicate that he is not of a high order of intelligence, but his story as a whole is neither so illogical or unnatural as to stamp him as a mental incompetent. His testimony also finds some support in the testimony of others, indicating that defendant when approached with reference to the transaction denied knowing the name of the boy, and that she admitted having concealed him from the officer and in other ways sought to prevent his prosecution.

At the close of the plaintiff's testimony the defendant moved the court as follows (we quote from the record): "Mr. Parsons: At the close of the testimony for the plaintiff, and after the plaintiff had rested, the defendant moves

the court to strike from the record all the testimony of witness, Marion Comegys, on the ground that the examination of the said Marion Comegys develops that he is of so defective memory that his testimony is unworthy of belief and no credence can be put on it; second, that the examination of the said Marion Comegys discloses to the court that he is so absolutely untruthful that his testimony can not be considered in a court of justice; third, that the testimony of the plaintiff's other witnesses upon every point that touches the said Marion Comegys absolutely disputes his testimony. The defendant also moves the court to instruct the jury to return a verdict for the defendant on the ground that there is not sufficient evidence to sustain a verdict; second, that it would be the duty of the court if a verdict were rendered against the plaintiff in this case to set it aside." Upon the submission of this motion the court made the following order: "The evidence of the boy will be stricken from the record and the motion to direct a verdict will be sustained." A subsequent motion by the plaintiff for a new trial was overruled, and judgment upon the directed verdict was entered against plaintiff for costs, and he appeals.

It is unnecessary to enter upon any discussion of this case. The bare statement of the facts demonstrates the erroneous character of the judgment. That experienced and eminent counsel should present such a motion, and that the learned trial court should sustain it is explainable only upon the theory that they assumed the record thus made would never be reviewed upon appeal and that by this short and unconventional device a possible injustice might be prevented. It ought not to be necessary to say that the credibility of the witness and the value of his testimony were matters for the jury alone. Counsel may have believed him utterly unworthy of credence and the court may have fully sympathized with that view, nevertheless, it was the right of the plaintiff to have the judg-

ment of the jury thereon. To sustain the judgment in this case would be to establish a precedent destructive of the fundamental principles underlying our jury system. No argument can add emphasis to a self-evident proposition.

A new trial must be ordered, and for that purpose the judgment of the district court is *reversed*.

STATE OF IOWA v. J. D. CARSON, Appellant.

Fish and game: SHIPMENT OUT OF THE STATE: STATUTE. A delivery of game to a common carrier for transportation to a point outside of the state, in violation of the code prohibiting the shipment of game out of the state, constitutes a shipment within the meaning of the statute, even though the game was taken from the carrier by state authorities while yet within the state.

**Appeal from Clay District Court.—Hon. D. F. COYLE,
Judge.**

THURSDAY, JUNE 9, 1910.

THE defendant was convicted of shipping game birds out of the state, and appeals.—*Affirmed.*

Geo. A. Heald, for appellant.

*H. W. Byers, Attorney-General, and Charles W. Lyon,
Assistant Attorney-General, for the State.*

SHERWIN, J.—The defendant delivered to the United States Express Company at one of its offices in this state a box of prairie chickens for transportation and delivery to a commission firm in Chicago, Ill. The box was properly billed to the address placed thereon by the defendant and

loaded on the express car of the train on the Chicago, Milwaukee & St. Paul Railway Company bound for Chicago. The box was taken from the express company and from the train at Marion, Iowa, by a deputy game warden of the state who acted under the authority of a search warrant. There were 41 undressed prairie chickens in the box. They were later disposed of in this state as provided by law.

The defendant was convicted under section 2555 of the Code, which provides that "no person . . . shall ship, take or carry out of this state" any game birds. He contends that, as the birds were taken from the express company while in this state, there was no shipment out of the state, and hence no violation of the law. He says, in effect, that the state authorities stepped in with a search warrant, and prevented the completion of a shipment which would have been unlawful if completed. We are of opinion that the delivery to the carrier for transportation to a point beyond the boundary of the state constituted a violation of the statute. The word "ship," as therein used, must be given its usual and ordinary meaning, for there is nothing in the law itself which indicates a different legislative intent. The words "ship" and "shipment" are now generally used to express the idea of goods delivered to carriers for the purpose of being transported from one place to another, and such signification is given to them by lexicographers generally. Webster's International Dictionary; the Century Dictionary. The law dictionaries give substantially the same definitions. See Abbott's, Bouvier's, and Rapalje & Lawrence's. The adjudicated cases are in general accord on the question. In a leading case in England, *Bowes v. Shand*, L. R. 2 App. Cas. 455, the court was unanimously of the opinion that the word "shipped" according to its natural and ordinary signification and meaning was the putting of goods on board a vessel and taking a bill of lading therefor; and it was there held that goods placed on

board in the month of February were not shipped in "March or April," although the ship did not in fact sail until March. In *Ledon v. Havemeyer*, 121 N. Y. 179 (24 N. E. 297, 8 L. R. A. 245), it was held that a contract for the sale of goods calling "for shipment within thirty days" does not require a clearance of the vessel within that period, but there was a compliance if, within that time, the goods were put on board a vessel for transportation within a reasonable time. The ordinary meaning of the word "shipped" is to load for transportation. *Fisher v. Minot*, 10 Gray (Mass.) 260; *Harrison v. Fortlage*, 161 U. S. 57 (16 Sup. Ct. 488, 40 L. Ed. 616); *Caulkins v. Hellman*, 47 N. Y. 449 (7 Am. Rep. 461); *Schmertz v. Dwyer*, 53 Pa. 335. The defendant has not presented for our consideration any case which announces a different rule. In *Selkirk v. Stephens*, 72 Minn. 335 (75 N. W. 386, 40 L. R. A. 759), the exact point was not decided, but the language of the opinion seems to recognize the rule as herein stated. The court is not to presume that the Legislature intended the word "ship" to mean something different from its ordinary signification.

There is no merit in the appellant's contention, and the judgment must be, and it is, *affirmed*.

STATE OF IOWA v. JESSE FINLEY, Appellant.

Criminal law: EVIDENCE: DECLARATION BY THIRD PARTY: OBJECTIONS.

- 1 Where a party has made no objection to the introduction of evidence upon the trial he can not complain thereof on appeal. In this case the state offered evidence in rebuttal as to a declaration by another concerning what an accomplice in the crime told him as to who had committed the offense; and while not admissible as substantive evidence yet the objection can not be raised for the first time on appeal.

Examination of witness: DISCRETION. The form of questions pro-

2 bounded to a witness and rulings on objections to the examination are largely matters of discretion with the trial court, and will not be interfered with on appeal unless an abuse of such discretion is shown.

Instructions: EXCEPTIONS: REVIEW ON APPEAL. Where no exceptions are taken to the instructions given by the trial court they will not be reviewed on appeal.

*Appeal from Poweshiek District Court, Hon. B. W.
PRESTON, Judge.*

THURSDAY, JUNE 9, 1910.

DEFENDANT was indicted, tried, and convicted of the crime of murder in the first degree, and sentenced to the state penitentiary for life. He appeals. *Affirmed.*

Tom H. Milner, for appellant.

*H. W. Byers, Attorney-General, and Chas. W. Lyon,
Assistant Attorney-General, for the State.*

DEEMER, C. J.—Defendant is accused of having killed and murdered one Thos. W. Read. The murder is said to have occurred in January of the year 1905; and the state, for a conviction, relies largely upon the testimony of one Philip Martin, who it is admitted was an accomplice, if his testimony is to be believed.

Something like seven assignments of error are made, but they may be grouped under three heads. First, it is contended that the court erred in its rulings on the admission and rejection of testimony; second, that it erred in its instructions to the jury; and third, that the verdict is without support in the testimony.

I. A witness called by the state in rebuttal testified to a declaration made by one McGee as to what Martin, the accomplice, told him (McGee) as to who had killed Read.

McGee had been called by defendant as a witness for the defendant, and it is claimed that the testimony offered by the state rebutted McGee's testimony, or at least tended to impeach McGee.

1. **CRIMINAL LAW:**
evidence:
declaration by
third party;
objections.

The record is in no such condition that we can determine this question. The testimony of which complaint is made was not objected to at the time it was offered, or at any other time, and defendant asked no instructions with reference thereto. It is manifest that the testimony was not admissible as substantive evidence, and that it may not have been admissible at all. But as defendant made no objection thereto he cannot complain thereof on this appeal. Nowhere in the record made in the trial court was there any objection to or complaint made of this testimony. Without objection or complaint in the lower court there is nothing for us to consider. *State v. Rennick*, 127 Iowa, 294; *State v. Stafford*, 145 Iowa, 285; *State v. Pratt*, 20 Iowa, 268, and cases cited.

Rulings on objections made by the state to the cross-examination of some of its witnesses, and upon objections made by the defendant to the form of certain questions propounded to its witnesses by counsel for the

2. **EXAMINATION
OF WITNESS:**
discretion.
state, are complained of. Such rulings as are well known are largely discretionary, and an appellate court is not justified in interfering in the absence of a showing of abuse of that discretion. This does not appear in the record as presented to us. Other rulings are complained of which need not be set out, as they embody well-settled principles of law, which need not be elaborated.

II. The trial court gave the following, among other instructions: "It is for the jury to say whether or not, under all the facts and circumstances proven on the trial, there has been sufficient corroboration of the witness Martin. In passing on this question, it is proper for you to take into consider-

3. **INSTRUCTIONS:**
exceptions:
review on
appeal.

ation any statements made by the defendant, Finley, if made in reference to the alleged crime, to other witnesses, or on the witness stand in his own behalf; also, whether or not he was with Martin on the evening before the alleged killing, and the circumstances thereof, and his conduct and association with Martin thereafter, if shown and as shown; whether or not the defendant Finley, by his actions or conduct, attempted to screen, and did screen, said Martin from suspicion in regard to the transaction, and all other facts and circumstances shown by the testimony, as bearing on that question." This is complained of because it is said it was impossible for the jury to tell whether the court was referring to the question of Finley's credibility or to the corroboration required. As no exception was taken to this or any other instruction given by the trial court, and as defendant asked no instructions there is nothing for us to consider. *State v. Hathaway*, 100 Iowa, 225. The instruction is not in itself erroneous in any event.

III. Defendant did not file a motion for a new trial nor did he ask for a directed verdict, but he now insists that the verdict is without support in the testimony. With this contention we cannot agree. There was sufficient testimony, if believed, to justify the verdict, and we should not interfere.

We see no tenable ground for reversing the case, and the judgment must be, and it is, *affirmed*.

STATE OF IOWA v. JAMES WATKINS, Appellant.

Criminal law: EVIDENCE: INSTRUCTION. A defendant in a prosecution for murder can not complain of an instruction given at his request, to the effect that if the jury find a certain witness to be the wife of the defendant no consideration is to be given her testimony, but if she was not his wife it should be given such weight as it was entitled to.

Murder: SELF-DEFENSE: EVIDENCE. In this prosecution next instructions 2 the evidence is reviewed and held to raise an issue of fact to excite for submission to the jury.

Same: PROVOCATION: INSTRUCTION. To render the taking of killing 3 manslaughter instead of murder, the provocation must be such as has a natural tendency to produce such a degree of excitement or disturbance of mind of an ordinary person as to dethrone reason and cause him to act from passion rather than deliberation and judgment. In this action there was evidence that defendant had previously armed himself with a deadly weapon for the encounter, and it is held that the court's instruction that to constitute great and present provocation which would render the killing manslaughter instead of murder there must be something extraordinary, was not erroneous, especially as the court also instructed that the provocation must be sufficient to excite passion in a reasonable person.

*Appeal from Polk District Court.—HON. JESSE A. MILLER,
Judge.*

THURSDAY, JUNE 9, 1910.

THE defendant was convicted of murder in the first degree, and appeals. *Affirmed.*

J. B. Rush and S. Joe Brown, for appellant.

*H. W. Byers, Attorney-General, and Charles W. Lyon,
Assistant Attorney-General, for the State.*

LADD, J.—I. The accused killed John Weaver, who had been a boarder at his house, August 10, 1909. The deceased had been married to Mary Sanders in the forenoon of that day. She had lived with defendant eight years, but had left him two days prior to her marriage to Weaver. She denied ever having been married to defendant, but the latter testified that she had been his wife during the time they had lived together. Objection to the woman's compe-

1. CRIMINAL LAW:
evidence: instruction.

ation any ~~stop~~ witness because wife of the defendant was over-made in ~~r~~ ^{as} the witnesses were before the trial court, we or on ~~th~~ say it erred in crediting the woman's testimony not ⁱⁿ instead of the man's. It instructed the jury that if they found from a preponderance of the evidence that she was the wife of defendant, no consideration should be given her testimony, but if she was not his wife, then it should be given such weight as it was entitled to receive. The defendant requested that the jury be so instructed and therefore he cannot be heard to complain. See *State v. Rocker*, 130 Iowa, 239; *Com. v. Mudgett*, 174 Pa. 211 (34 Atl. 588).

II. The woman testified that deceased was unarmed and had made no attack on defendant, as did Mrs. Stark, at whose house the shooting occurred. Their testimony was corroborated by that of McCray. According

2. **MURDER:** self-defense: to defendant's story, after an interchange of words concerning their respective rights to the woman, deceased pulled a revolver, a scuffle ensued when defendant got hold of it, pulled the trigger, and all was over. Plainly enough, the issue of self-defense was for the jury. Moreover, the evidence was such that the jury might have found that Mary Sanders was not defendant's wife, that he had been aware for some time previous of her intimacy with Weaver, and that he had armed himself with a loaded revolver for the purpose of killing his rival, and, therefore, that the provocation was not such as to reduce the offense to that of manslaughter.

III. In defining the provocation which would render homicide manslaughter instead of murder, the court said in the course of an instruction that, "to constitute the great

3. **SAME:** provocation: instruction. and present provocation, it must be something extraordinary in its nature." Appellant criticizes the use of the word "extraordinary," but in the connection found and followed by the sentence indicating precisely what was intended, it could not

have been prejudicial, especially in view of the next instruction directing that the provocation must be sufficient to excite passion in a reasonable person. If the facts were as related by defendant, the killing was in self-defense and not owing to other provocation than the assault on him. If, as related by other witnesses, he had previously armed himself with a deadly weapon for the encounter, then the provocation must have been great to render the killing manslaughter instead of murder. *State v. Vance*, 17 Iowa, 138; *State v. Hockett*, 70 Iowa, 442. It must have been reasonable, as contended by appellant; that is, such provocation as had a natural tendency to produce a state of mind in an ordinary man of average disposition, in which reason is so disturbed or obscured by passion that the person is likely to act rashly, without due deliberation, and from passion rather than judgment. In other words, in determining whether provocation is reasonable or sufficient, ordinary human nature, the average of men of fair, average mind and disposition is the standard, and the provocation must be such as is likely, or has a natural tendency, to produce such a degree of excitement or disturbance in the mind of such men as that reason is dethroned by passion, and the act is the product of the latter rather than judgment. *Maher v. People*, 10 Mich. 212 (81 Am. Dec. 781); *State v. Ferguson*, 2 Hill (S. C.) 619 (27 Am. Dec. 412).

Manifestly, no precise line can be drawn by which to distinguish between provocations which will and will not mitigate the offense from murder to manslaughter. But, as said in Clark & Marshall on the Law of Crimes, 355: "Reasonableness is the test. The law contemplates the case of a reasonable man—an ordinary, reasonable man—and requires that the provocation shall be such as might naturally induce such a man, in the anger of the moment, to commit the deed. The rule is that reason should at the time of the act be disturbed by passion to an extent which

might render ordinary men, of fair, average disposition, liable to act rashly and without reflection, and from passion rather than judgment." Manifestly the provocation calculated to lead to this result must be something more than ordinary. It must be great or extraordinary, as the jury was told, though it is preferable to specifically state rather than characterize what is essential.

We have discovered no error in the rulings complained of, and the judgment is *affirmed*.

STATE OF IOWA v. B. F. DOUGHERTY, Appellant.

Intoxicating liquor: FORMER JEOPARDY. The seizure of liquor under a search warrant is primarily a proceeding against the property seized, the question being whether the same was owned or kept for sale in violation of law at the time of seizure; and an adjudication that the same were not kept with intent to sell for wrongful purposes is not a bar to a prosecution for maintaining a place where intoxicants were illegally kept for sale prior to the time of such seizure.

Appeal from Lucas District Court.—Hon. C. W. VERNON MILLION, Judge.

THURSDAY, JUNE 9, 1910.

THE defendant was convicted of maintaining a liquor nuisance, and appeals. *Affirmed.*

Stuart, Stuart & Stuart, for appellant.

H. W. Byers, Attorney-General, Chas. W. Lyon, Assistant Attorney-General, and William Collinson, County Attorney, for the State.

LADD, J.—The accused was indicted for having main-

tained a place wherein intoxicating liquors were alleged to have been illegally kept for sale and sold since January 1, 1908. He was convicted, and the only error assigned is the ruling by which a plea of former adjudication was denied. It appeared from this plea that on July 15, 1909, a search warrant was sued out of justice court and intoxicating liquors seized thereunder, that defendant and another interposed the plea in justice court that said liquors were not kept with intent to sell for other than lawful purposes and ultimately this plea was sustained and said liquors ordered to be returned to them. The issue therein was whether said liquors when seized were owned or kept by defendant for the purpose of sale in violation of law. Section 2415, Code. This was decided in the negative and necessarily exonerated him from the charge of illegally keeping the liquors in controversy. But he may have had other intoxicants in his possession at the time or before or since for the purpose of unlawful sale, and a subsequent finding to this effect was not inconsistent with the above determination. Search warrant proceedings are primarily against the liquor, not the owner, and the adjudication is limited to the beverage seized under the warrant. If such beverage was intoxicating, no more was determined than that defendant was not keeping it with intent to sell in violation of law. From the circumstances that he was keeping it for a lawful purpose, it does not necessarily follow that he was not then or before or since keeping intoxicants for an unlawful purpose. The vice in appellant's reasoning lies in the assumption that the order in the search warrant proceedings amounted to an acquittal of some offense; whereas, it merely determined defendant's purpose in keeping the particular liquors seized. The plea of defendant was rightly held insufficient. *Affirmed.*

STATE OF IOWA v. CHARLES B. HULSMAN, Appellant.

Perjury: INDICTMENT: TRAVERSE OF FALSE STATEMENTS. Perjury consists in the wilful and false swearing to a material matter; and both the indictment and the evidence must traverse the truth of the statements claimed to be false. In this action perjury is assigned on statements contained in a sworn notice of claim of ownership of property and the indictment fails to traverse the statements made by defendant in the notice.

Oath: FORM OF. There is no statutory form of an oath and any form thereof which is calculated to appeal to the conscience of the person to whom it is administered and by which he signifies that his conscience is bound is sufficient. Omission from the oath of the words, "So help you God," is immaterial.

*Appeal from Polk District Court.—HON. JESSE A. MILLER,
Judge.*

FRIDAY, JUNE 10, 1910.

THE defendant was tried on an indictment charging him with perjury. He appeals from a judgment on a verdict of guilty. *Reversed.*

James Nugent, for appellant.

*H. W. Byers, Attorney-General, and Chas. W. Lyon,
Assistant Attorney-General, for the State.*

SHERWIN, J.—The defendant claimed to be the owner of several cases of shoes which had been levied upon as the property of S. E. Carter, and served a notice of such ownership on the sheriff as provided by section 3991 of the Code, whereupon the goods were released from the levy. The court instructed that a conviction would be warranted if

the jury found that at the time the defendant signed and swore to the notice and at the time he delivered it to the sheriff, he knew that he was not the owner of the shoes, and knew that he had not bought them of Carter and paid therefor the sum alleged therein to have been paid. The instruction was erroneous and prejudicial. Perjury under the statute is the willful false swearing to a material matter. The material matters in this case were whether the defendant was the owner of the shoes at the time in question, and whether he bought them of Carter and paid him therefor the amount stated in the notice served on the sheriff. A conviction could be had only upon a finding that such material matters were untrue in fact. In *State v. Gallagher*, 123 Iowa, 378, we held that an indictment that failed to traverse the truth of the false testimony was fatally defective. And of course the evidence must do so. The indictment in the instant case fails to contradict the statements made by the defendant in the notice served on the sheriff, and the court undoubtedly fell into the error by following the language of the indictment.

The notice purports to have been signed and sworn to before a notary public. The notary testified that the defendant was sworn by him, but that he did not remember the exact form of the oath administered to him. He said, however, that he did not think he used the words "So help you God" in administering the oath. Based upon this testimony the defendant contends that there is insufficient proof that an oath was administered. The statute makes no general requirement as to the form of an oath. The purpose of an oath is to secure the truth, and hence any form thereof which is ordinarily calculated to appeal to the conscience of the person to whom it is administered, and by which he signifies that his conscience is bound, is sufficient. 27 Am. & Eng. Enc. of Law, 682; *State v. Gay*, 59 Minn. 21 (60 N. W. 676,

50 Am. St. Rep. 389); *O'Reilly v. People*, 86 N. Y. 154 (40 Am. Rep. 525); 2 Bouv. Law. Dict. 320; 30 Cyc. 1416.

The omission of the words "So help you God" is immaterial. *People v. Parent*, 139 Cal. 600 (73 Pac. 423).

Other alleged errors are discussed by counsel, but we need not further notice same. For the error pointed out, the judgment is *reversed*.

**HARRY B. JAMES, SERENA H. JAMES, Appellants, v. JOHN
NEWMAN, BEADA NEWMAN, G. W. VESPERS and MARY
G. VESPERS, Appellees.**

Mortgages: TRANSFER OF PROPERTY TO MORTGAGEE: GOOD FAITH PURCHASE: ASSIGNMENT OF MORTGAGE. Where the original mortgagee subsequently acquires full title to the property by a conveyance from the mortgagor the transaction amounts to a release of the mortgage, and an innocent purchaser from the mortgagee will take the property free from the lien of the mortgage as against a previous unrecorded assignment of the same, and unaffected by the question whether he had actual notice of the outstanding mortgage or not.

Assignment of mortgages: INDORSEMENT ON MARGIN OF RECORD: CONSTRUCTIVE NOTICE. To constitute constructive notice of the assignment and transfer of a mortgage the assignment transferring the same must be signed, acknowledged, recorded and properly indexed as required by statute. But granting that constructive notice of the assignment thereof may be afforded by a notation of the transfer on the margin of the record of the mortgage, the burden rests upon one claiming under the assignment to prove the same in the same manner as other written instruments of evidence are proven, and to show that it existed upon the record prior to a transfer of the property to a good faith purchaser.

*Appeal from Appanoose District Court.—HON. FRANK W.
EICNELBERGER, Judge.*

FRIDAY, JUNE 10, 1910.

ACTION in equity to foreclose a mortgage on real estate. Plaintiff is an assignee of the mortgage. Defense is made only by defendants G. W. and Mary G. Vespers, husband and wife. These defendants were not parties to the mortgage, but were subsequent purchasers of the mortgaged property from the mortgagee in alleged good faith and for full value and without notice of plaintiff's rights. There was a decree for the defendants, and the plaintiffs appeal.—*Affirmed.*

H. E. Valentine, for appellants.

Fee & Fee, for appellees.

EVANS, J.—The real estate involved was formerly owned by John Newman, who on July 10, 1894, executed a mortgage thereon for \$400 to the Clark & Peatman Investment Company. The mortgage was duly recorded on July 19, 1894. As the mortgage now appears, it bears a written assignment by the Clark & Peatman Investment Company to Wm. M. James, purporting to have been made on July 10, 1894. This assignment, however, was neither acknowledged nor recorded. On March 1, 1895, the mortgagors, John Newman and wife, conveyed the property by warranty deed to the mortgagee, Clark & Peatman Investment Company, and thereupon the Clark & Peatman Investment Company conveyed the same property in like manner to the defendant Vespers. Vespers bought in good faith and paid a consideration of \$800 therefor without any actual notice of any outstanding incumbrance against the premises. The interest on the mortgage was paid annually to James by some one other than Vespers up to January, 1906. The plaintiffs are executors of the estate of William M. James. There are other facts in the case which we will notice in a separate division of the opinion.

I. The first question presented for our consideration is whether upon the facts above stated Vespers took the property discharged of the lien of the mortgage. It will

be noticed that he holds his title by direct
1. Mortgages: transfer of property to mortgagee: good faith purchaser: assignment of mortgage.

conveyance from the mortgagee. Did such conveyance discharge the mortgage as to an innocent purchaser notwithstanding the fact

that the mortgagee had previously sold and delivered the note and mortgage, and had no interest therein at the time of the conveyance, there being no record of the assignment? We think the point is fully covered by our previous decisions. It is ordinarily true that the mortgagor himself may not take advantage of the failure of an assignee to record his assignment of a mortgage, provided the assignee has possession of the original instruments. The mortgagor is entitled to a presentation and surrender of the original instruments as a condition of payment thereof, and this is ordinarily a sufficient protection to him against an unrecorded assignment. It is also ordinarily true that a subsequent purchaser of real estate may not complain of a failure of an assignee of a mortgage to record his assignment where the mortgage itself appears of record against the land. In such a case the purchaser being charged with notice of an outstanding mortgage, its present ownership is deemed immaterial until such owner is in some manner misled by a purported release or subsequent assignment by the original mortgagee. But it has uniformly been held by this court heretofore that, where the original mortgagee subsequently acquires the full title and conveys the same by warranty deed, such conveyance amounts to a release of the mortgage, and such purchaser may rely upon the apparent right of the mortgagee of record to so convey. Where an assignee of a mortgage fails to record his assignment, he takes the risk of dishonest dealing on the part of the mortgagee with subsequent innocent purchasers. *Jenks v. Shaw*, 99 Iowa, 604; *Bank v Ander-*

son, 14 Iowa, 544; *Central Trust Co. v. Stepanek*, 138 Iowa, 131; *Farmer v. Bank*, 130 Iowa, 469; *Livermore v. Maxwell*, 87 Iowa, 706; *Parmenter v. Oakley*, 69 Iowa, 338; *Bowling v. Cook*, 39 Iowa, 200. See, also, *Woodworth v. McCollum*, 16 N. D. 42 (111 N. W. 623). The reasons for the rule are fully discussed in the cited cases and it will serve no useful purpose that we repeat the discussion.

It is argued by appellant, however, that it appears from the testimony of Vespers that he knew nothing about the original mortgage, and that, therefore, he could not be injured by the failure of plaintiffs' testate to record his assignment. It appears that Vespers was an unlearned man, apparently without experience, and purchased the property without an abstract of title. He was manifestly incapable of forming any judgment of his own as to the state of the title he was purchasing, but relied wholly upon the assurances of others. He was assured that "There was nothing against it," and he relied upon such assurance. Such assurance could have been honestly given by any person who should examine the indexes, and ascertain that the only mortgage appearing against the property was one made to the present grantor as mortgagee. Vespers would not lose his status as an innocent purchaser simply because he was not himself versed in, or able to comprehend, the details of the title he was acquiring. The important ultimate fact to him was that he was buying a clear title. He was so assured. The assurance was justified upon the record. He was charged with constructive notice of the mortgage as a mortgage to his warrantor. The fact that he had no actual notice of it would not affect the status of either party. The argument urged by appellant would hold that, if Vespers had actual notice of the mortgage, he could stand before us as an innocent purchaser; but that, inasmuch as he had no actual notice, he was not an innocent purchaser. We do not deem the point well taken, and

we hold that he was an innocent purchaser, regardless of the question whether he had actual notice of the outstanding mortgage.

II. In addition to the facts already stated, there appears at the present time upon the margin of the record of the mortgage in suit the following: "For value re-

ceived we hereby assign the within mortgage
2. **ASSIGNMENT**
OF MORTGAGES: to William M. James. Clark & Peatman
indorsement
on margin
of record:
constructive
notice.
Investment Co. William Peatman, 9-24-94."

It is argued by appellant that this purported assignment upon the margin of the record was equivalent to the recording of the assignment, and imparted constructive notice of such assignment. The discussion of appellant at this point deals with the interesting question whether an assignment of a mortgage may be so made upon the margin of the record of such mortgage as to impart constructive notice. The state of this record will not justify us in entering upon that question. That an assignment properly made upon a margin of the record of a mortgage would be sufficient actual notice to any person who saw the same may be conceded. Whether it should be deemed constructive notice as against all the world is a very different question. Assuming that it should be so deemed, the burden would still rest upon the plaintiff to prove the assignment in the same manner as any other written instrument of evidence. This alleged instrument as it appears upon the margin of the record was not acknowledged, and was therefore not self-identifying as an instrument of evidence. It purports to have been executed by William Peatman. What relation he sustained to the company or what authority, if any, he had, does not appear. No foundation was laid, nor was any preliminary proof offered, of the fact of the execution of this instrument as a basis for its introduction, and it was received into the record over proper objection by defendant. Still more serious for appellant is the fact that the record contains no evi-

dence nor offer of any, to show when this writing was actually made upon the margin of the record. The appellant relies upon the writing itself as proof of that fact. The writing itself does not purport to bear a date, unless the figures "9-24-94" following the name of William Peatman can be construed as such. This is the assumption of appellant's argument; it being assumed that such marginal entry was made on September 24, 1894. If such marginal entry can be deemed constructive notice, it was surely incumbent upon the plaintiff to prove by some proper evidence that it existed upon the record prior to March 1, 1895, and we think appellant has failed at this point.

Speaking, however, to the merits of the legal question here proposed, we may say that constructive notice as distinguished from actual notice is a creation of the statute, and is available to a party only in accord with the provisions of the statute. In order to impart constructive notice to third persons of any instrument of transfer by one person to another, the statute contemplates and requires that it be properly acknowledged by the parties, and that it be filed for record and spread upon the records of the county recorder, and that it be properly indexed. Code, section 2927 *et seq.* We know of no rule of law that would justify us in dispensing with these prerequisites to constructive notice. Appellant places reliance upon a remark contained in the opinion in the case of *Bank v. Anderson, supra*, wherein this method of assignment is suggested as a method whereby such assignment "must inevitably be seen by any one looking for incumbrances." This suggestion was manifestly intended to point out a way whereby actual notice could be imparted. There is no suggestion in the opinion that such method would impart constructive notice to one who had no actual notice. Appellant, also, relies upon the case of *Savings Bank v. Colby*, 105 Iowa, 424. This case, however, is not in point. In that case a mortgagee wrongfully obtained from the mortgagor new notes and mortgage

in satisfaction of a prior mortgage which the mortgagee had previously transferred and did not then own. The new notes so obtained were transferred by him to a national bank. Such national bank was forbidden by the law of its organization to take real estate as security. It did not, in fact, take the mortgage as security, but took the notes alone without any knowledge of the existence of the mortgage, securing the same, and therefore without any reliance thereon. It was held that it was in no position to challenge the first mortgage in the hands of its purchaser.

We think that the defendants, G. W. Vespers and wife, by their purchase, took the mortgaged property discharged of the lien of the mortgage. The trial court so held, and its decree is *affirmed*.

J. J. HOPPES v. DES MOINES CITY RAILWAY COMPANY,
Appellant.

Drainage: OBSTRUCTION TO FLOW OF SURFACE WATER: PLEADINGS:
1 **SUFFICIENCY: APPEAL.** A petition in an action for damages caused by obstructing the flow of surface water, which fails to allege interference by defendant or any one else with the flow of the water in any manner, is insufficient; but where no objection to the pleading is interposed on the trial and the same proceeds with acquiescence of the parties as though the pleading was sufficient in this respect, it will be so treated on appeal.

Same: STREET GRADES: DUTY OF ADJOINING OWNER. Where a city 2 has not established a grade line for its streets an abutting property owner is not required to bring his lots to the existing grade to protect the same from overflow by surface water.

Same: STREET DRAINS: EVIDENCE. In this action for injury to abutting lots by overflow of surface water the questions of whether the damage resulted from unusual rainfall, and whether the tiles provided could reasonably be expected to carry the water across the street, were for the jury.

Pleadings: ASSIGNMENT OF CAUSE OF ACTION: ADMISSION: EVIDENCE.
4 A general denial in answer to a petition setting out a copy of a

written assignment of the cause of action is an admission of the genuineness of the signature to the assignment but nothing more. And to authorize recovery by the assignee a delivery of the assignment must be shown, and this is ordinarily done by introducing the instrument in evidence.

Assignment of cause of action: EVIDENCE. In this action to recover 5 by an assignee of a claim for damages evidence of the assignment of the claim is reviewed and held to present a question for the jury.

Appeal from Polk District Court.—Hon. HUGH BRENNAN, Judge.

FRIDAY, JUNE 10, 1910.

ACTION for damages resulted in a judgment against defendant, from which it appeals. *Reversed.*

C. C. Cole and John Newburn, for appellee.

Guernsey, Parker & Miller, for appellant.

LADD, J.—The case is peculiar, in that no cause of action was stated in the petition. In the first count plaintiff claimed damages "by reason of overflow of surface water overflowing his lots . . . by reason of the stopping of the natural course of the water flow at East Thirtieth and North streets, city of Des Moines." In the second count the claim is for damages to the lots of B. F. Plummer, alleged to have been assigned to plaintiff, and "by reason of damages sustained" by Plummer "by reason of the overflow of surface water on his property, . . . causing the interference and hindrance of the natural water course. Said dam and stoppage of the natural flow of water is in East Thirtieth and North streets." The third count is based on a claim of Ed Hanson alleged to have been assigned to plaintiff, and in the language of the second

count. The petition alleged generally that the floods were in May and August, 1908. In response to motions for more specific statement, plaintiff filed an amendment alleging the time to have been August 14, 1908, "that the natural course of water flow" was from the northwest to the southwest, and that the assignment of Plummer was oral at first and afterwards reduced to writing and that of Hanson oral. In a second amendment the damages claimed in each count were itemized. In the third amendment, "in addition to damages for the times already set out," damages suffered by Plummer and Hanson in 1907 are claimed, but on what ground save inferentially was not alleged. The answer was a general denial.

It will be observed that neither the petition nor amendments charge defendant or any one else with having interfered with the flow of water either rightfully or wrong-

fully. But no objection on this ground was interposed by demurrer, motion to direct ver-
dict, or in arrest of judgment, and, as de-
fendant was content not to take exception to
pleadings:

sufficiency:
appeal.

the sufficiency of the petition as amended in the trial court, it may be that he ought not to be heard to do so here by pointing out discrepancies in this respect between the allegations of the petition and the issues as submitted to the jury. The trial seems to have proceeded as though the allegations were that defendant had obstructed the flow of water in a water course by replacing a bridge by tile inadequate to carry off the water at the intersection of North and Thirtieth streets in Des Moines, and so doing negligently, and, no objection having been urged that these matters had not been pleaded, acquiescence in their adjudication may have been rightly assumed. *Hoyt v. Hoyt*, 68 Iowa, 703; *White v. Byam*, 96 Iowa, 166; *McFarland v. Muscatine*, 98 Iowa, 199; *Hobbs v. Marion*, 123 Iowa, 726; *Buce v. Eldon*, 122 Iowa, 92; *Osborne v. Metcalf*, 112 Iowa, 540. The practice, however,

is not to be approved and is adverted to now that the defects in pleading may be obviated before another trial.

II. In 1901 the defendant extended its track on Thirtieth street in Des Moines north to North street, and then in an easterly direction on it. Another track was put in two or three years later. At the intersection of North and Thirtieth streets there had been a bridge with opening beneath about ten feet wide by six feet deep. A ditch eight feet wide and four feet deep extended from the north or northwest beneath this bridge, and through it the surface water ordinarily flowed off. As we understand the record, this bridge was removed by defendant and two twenty-four inch tiles laid in the ditch through the street, and it filled. Several witnesses say that, in addition to this, there was a small box passageway for the water. As to whether defendant also raised the physical grade is in dispute; some witnesses testifying that it did raise the grade of North street about two feet, and that the city raised that on Thirtieth street about the same, while others say that in laying the tracks no change in grade was effected. The evidence is also in conflict as to whether there was a waterway or course at that place. Suffice it to say that the evidence was such that the jury might have found there to have been a waterway such as that defendant might not have lawfully obstructed, and that it in laying its track raised the street grade.

The evidence also was in conflict as to whether the tile afforded an adequate outlet for water such as might reasonably be anticipated to accumulate for passage at that place. The assumption on the part of the appellant that the city raised the grade of North street, if it was changed in laying the tracks, and that tiles were laid under the supervision of the city, is not borne out by the record.

No grade line for either street had been established by ordinance or resolution of the city council, and therefore neither plaintiff nor his assignors were under any obliga-

tion to bring their lots up to the level of the physical grade.

2. SAME: street Even if water did stand over the grade for
grades: a time, the evidence was such that the
duty of adjoin- jury might have found that it was unduly
ing owner. held back by reason of the inadequacy of the tiles to carry
it off with reasonable celerity.

Whether the injury was due to an unprecedented rainfall and the tiles were sufficient to carry off the water which might reasonably be expected to accumulate were appropriate issues for the jury. Appellant suggests

3. SAME: street that, inasmuch as defendant occupied a public street, it was under no obligation to provide a passageway. This does not meet the case. Whether required to or not, it did remove the bridge and inserted the tile instead, and, if thereby it negligently obstructed the proper flow of water in a water course, it is liable for consequential damages, regardless of any supposed liability on the part of the city.

III. As said, the petition alleged injury to the premises of one Plummer, and that he had assigned his claim for damages to plaintiff. No evidence whatever of any as-

4. PLEADINGS: assignment according to an answer to a special interrogatory, \$200 of the verdict was for damages
of cause of action: to Plummer's property. True, what purported to be a copy of a written assignment from Plummer to plaintiff was made part of and attached to the petition, and, the answer being a general denial, the genuineness of the signature thereto was thereby admitted. Section 3640, Code. But nothing more than the genuineness of the signature is to be inferred from omission to put such signature in issue by the answer. Delivery must be shown whether the signature be admitted or proven by evidence adduced at the trial, and ordinarily this is done by introducing the instrument in evidence. In the absence of any

proof of the assignment of the claim, it was error to allow recovery thereon.

IV. Nor was the evidence of an assignment of Hanson's claim to plaintiff conclusively established as held by the court. Hanson testified as follows: "Q. I believe you

5. **ASSIGNMENT
OF CAUSE
OF ACTION:
evidence.** have a claim in here that you have assigned, have you? A. I think so; yes, sir. Q. You assigned it to Mr. Hoppes? A. Yes, sir."

But farther on he said: "I do not know as I assigned my claim over to him. I never signed any writing at all giving him any right to sue for damages. Q. Did you know that your claim was in this case at all? A. Well, my claim is here, I guess, but I did not assign it to Mr. Hoppes that I know of. . . . I don't know what was said about Mr. Hoppes bringing suit in my behalf. Don't remember saying anything to that effect. . . . I never sold him or transferred to him any right to bring suit as to this claim. I did not sell my claim to anybody. We were talking about it. I still own the claim." Redirect: "And you never transferred it to him for the purpose of bringing this action? A. He and I were talking about it, and he told me to come in and see you. Q. Did you transfer it to him? State what you said. A. No; I do not know that I ever did." Here counsel suggested the dismissal of the claim, and witness testified that he had talked with counsel about damages to his potatoes, and that he should have something. The witness then inquired what was meant by assigning, and was told that it meant "transferring for the purpose of bringing this action. By the Court: You have a right under the law to assign this claim, if you have one, and the person to whom you assign, or give the authority, may bring the action. Now, did you in talking to Mr. Newman or to Mr. Hoppes give either one of them the right to bring this action for you? A. Well, since you show it out to me in the light of it, I guess I did to Mr. Hoppes. I did not understand what you were trying to get at." Re-

cross-examination: "Q. What did you say to Mr. Hoppes? A. We were talking about it one day, and I was telling him about my stuff being damaged by the water, and he said he thought we could get damage for it, and I said, if we can, we ought to have it. To put stuff out there and lose it out, we ought to have something for it. Q. What else did you say to him about it? A. We did not say a great sight about it. He said we could go up here and try to get damages for our stuff, and I suppose he came up and seen about it, and I came afterwards. I never told him that he could have my claim against the company or the claim should be transferred to him, so that he could bring the suit. I do not know that I ever told him he could have my claim. I never told him it should be his claim for the purpose of bringing suit." Here counsel for plaintiff again suggested a dismissal of the claim, but the court expressed the view that the witness did not wish it to be understood that he had given his claim away for fear he would get nothing for it, to which the witness assented. "By the Court: But in this talk with Mr. Newman did you authorize him and Mr. Hoppes to bring this action for you, and what was recovered you were to get? A. Certainly that is the way it was." Here defendant moved the answer be stricken as a conclusion, and the court explained that he was interfering because of the witness' misunderstanding and inquired if plaintiff still insisted on dismissing the claim. Counsel replied he would take the chance of trial. Again the witness was asked on cross-examination to relate what was said between him and Hoppes or between him and Newman, and answered that the talk was that they ought to have damages, that Hoppes said he was going to see about bringing suit; that he did not remember that anything was said about bringing it in his name; that "there was nothing said about his suing for my claim, or me suing for his claim, or each fellow bringing his own suit, only he was coming to see about it;" that at Hoppes'

suggestion he saw Newman, and supposed "he talked it was going to be brought in Hoppes' name," but "there was nothing much said about it. . . . Hoppes said it was to be brought in his name. This was before we ever consulted a lawyer." Counsel for plaintiff then asked whether he told attorney for plaintiff, "You would assign your claim to Mr. Hoppes as well as the rest of them, and he would bring the action for all of them," and the answer was: "Yes; I guess I did." Q. And you consented to that, did you not? A. Yes, sir." It will be observed that, when the witness was called upon to relate what was said, he insisted that nothing which might be construed as an assignment was said to either counsel or plaintiff, but in the first instance stated there was an assignment, and such might be inferred from his last assertion that he had consented. Whether the latter was induced by fear that the claim might be dismissed and what he had said before was true ought not to have been determined by the court, but the issue as to whether there was any assignment of his claim to plaintiff should have been submitted to the jury.

V. Exception is taken to the instruction on measure of damages, and it may be that the rule applied to the claim of plaintiff was not quite consistent with that applied to the claim of Plummer. Aside from this, the law as laid down was well calculated to the ascertainment of the damages suffered. See *Tretter v. Railway*, 126 N. W. 339; *McMahon v. Dubuque*, 107 Iowa, 63, 77 N. W. 517, 70 Am. St. Rep. 143.

Because of the errors pointed out, the judgment is reversed.

THE STATE OF IOWA, Appellee, v. JOHN JUNKINS,
Appellant.

Murder: MITIGATION OF DEATH PENALTY: EVIDENCE. On this prosecution for murder resulting in a judgment assessing the death penalty, the evidence is reviewed and held insufficient to show such defective mental and moral capacity of defendant as to justify mitigation of the judgment.

Same: MISCONDUCT IN ARGUMENT. Although the argument of counsel for the state that the death penalty ought to be imposed because in the event of life imprisonment there was a probability that defendant might be paroled or pardoned, while improper, was not ground for reversal in this case, because under the record there was no reasonable probability that the verdict would have been otherwise had the objection to the argument been sustained.

Appeal from Appanoose District Court.—Hon. M. A. ROBERTS, Judge.

FRIDAY, JUNE 10, 1910.

THE defendant appeals from a conviction of murder in the first degree. So far as is necessary for an understanding of the case, the facts are stated in the opinion.
Affirmed.

Joseph C. Mitchell, Francis M. Hunter, John R. Price, and Clarence Baker, for appellant.

H. W. Byers, Attorney-General, and Chas. W. Lyon, Assistant Attorney-General, for the State.

WEAVER, J.—In the early evening of February 5,

1909, Clara Rosen, a reputable young lady residing in the city of Ottumwa, left her home to call upon her sister, Mrs. Nelson, who lived a few blocks distant. Not arriving there, her friends became alarmed and entered upon a search, which resulted after a few hours in the discovery of her dead body not far from the Nelson home, in an old cellar or excavation upon a vacant lot from which a building had at some time been removed. Some brush had been thrown over the body, but it was not effectually concealed. That she had met a violent death was clearly apparent. The young woman's skull had been crushed, and there were indications that the fatal blow had been delivered with a heavy stone found in that vicinity. Her clothes were torn and when found her limbs were exposed. Whether the attack upon her had been made for the purpose of sexual crime is a matter of perhaps not conclusive inference, and for the purposes of the case, we may concede the contention of appellant's counsel that this aggravation of the offense is not clearly established. It is clear, however, that the assailant robbed the body of his victim of a diamond ring, bracelet, beads, purse, and other articles of more or less value. Circumstances which we need not pause to relate caused the appellant herein to be suspected of the crime, and he was later arrested and charged therewith. While in jail he signed a written confession of the robbery and murder. In talking with some of the witnesses, he claimed to have had a confederate who assisted in the commission of the crime. An indictment having been returned, counsel were assigned for the defense, and upon their application, the venue was changed to Appanoose county where the trial was had, resulting in a verdict of murder in the first degree and assessing the death penalty. Judgment was entered accordingly.

In submitting the appeal therefrom to this court, counsel concede the guilt of the accused and admit that his conviction of the crime is sustained by the overwhelming

weight of the testimony. Their plea for interference by this court is confined to the punishment 1. MURDER: mitigation of death assessed by the jury, which we are asked to penalty: evidence. reduce or change to imprisonment for life.

The argument, presented with great earnestness and force, is that the appellant has been shown to be a degenerate whose defective mental and moral nature renders him no more responsible for manifestations of criminal violence, than is a member of the brute creation having neither reason nor capacity to understand the moral quality of its act. To take the life of such a person in vindication of law and order is said to be an idle act, for it cannot operate as a deterrent to others of his class, for such as he are the blind slaves of their abnormal passions and criminal tendencies, and when these are aroused to activity the possibility of punishment, however severe or drastic, will not serve to turn them from their evil purpose. If a man who has led an honorable and lawabiding life becomes insane, and under the influence of a diseased mind, commits an atrocious murder, the law does not demand his life in punishment but contents itself with putting him in confinement, by which to restrain him from other acts of violence. "If, then," say counsel, "the law interposes the shield of its protection to save the life of a once normal person who has become insane, why should we not be equally reluctant to pronounce the death penalty upon one, who, by reason of a defective organization, moulded by pre-natal limitations and conditions, and developed in vicious environments for which he is not responsible, is also incapable of appreciating moral or social obligations?" Counsel here touch upon a question which is having the increasing attention of students of criminology and kindred topics, and it may be true, as many learned investigators think, that the methods which now prevail of protecting society against its defective and criminal classes are so unscientific in conception and so ineffective in practice

that a civilized people should discard them for other and saner schemes of retributive and preventive justice. But, as we have already suggested, the reform must come, if at all, through the lawmaking power, and until then the courts must administer the law as it is written. So long as the death penalty is retained for any offense, the provision of our statute which confides to the jury, and the jury alone, the option of assessing it constitutes a reasonably effective safeguard against its indiscriminate application. It is the chief virtue and value of our jury system that jurors are prone to look upon matters submitted to their consideration in the light of the experience and observation of the average man, and make reasonable allowance for human foibles and frailties, and, generally speaking, it may be taken for granted that the extreme penalty will not be pronounced except in the most marked and flagrant cases. True, there may be times of great popular excitement when the all-pervading atmosphere of prejudice and passion penetrates the inmost chambers of the temple of justice, rendering a fair trial difficult if not impossible. Ordinarily, however, it is within the power of the court, by granting change of venue or by temporary postponement, to insure a trial in which the issues will be fairly considered upon their merits.

In the case at bar the defendant was given a change of venue to another county. Nearly four months intervened before he was brought to trial. He was defended by distinguished, able, and experienced lawyers who have served him with unselfish zeal, and while not stultifying themselves by denying his guilt or asking for his acquittal, have presented every mitigating fact and circumstance in its most persuasive and forcible aspect. There is nothing to indicate that the trial was had under pressure imposed by outside influences, and we are bound to believe that the twelve jurors to whom the appellant's fate was committed reached the conscientious conclusion that, however defective

he may be in the attributes which make up a normal human being, he is not so lacking in capacity to distinguish between right and wrong, or in power to resist the leadings of criminal impulse as to justify a mitigation of the punishment which would justly be imposed upon him, were he the equal of the average man in respect to those qualities. Assuming the correctness of this conclusion, it must be said that if punishment by death may ever be justified, no more flagrant case calling for its infliction was ever tried than is presented by the record before us. We have not gone, nor shall we in this opinion, go minutely into the horrifying details of the appellant's offense. It is enough to say that in all the history of crime none more inexcusable was ever committed. It was murder, brutal, cruel, hideous, and cowardly in the extreme, and assuming the appellant's moral and legal responsibility, the assessment of anything less than the highest punishment provided by law, would be a startling failure of justice.

Nor does the evidence make such a showing of appellant's defective mental and moral capacity as to permit this court to interfere with the verdict. He had received some degree of education and was able to read and write. He appears to have known how to perform acceptable manual labor when disposed to do it. While a slave to drink and drugs, his faculties were not so obscured on the evening of his awful crime but that he remembered and related the circumstances attending it, and the disposition made by him of the booty taken from the body of his victim. It may be, as counsel suggest, that he is the natural and inevitable product of "Smoky Row" and the slums of the city, and that in a certain just sense the ultimate responsibility for turning out such as he to prey upon the innocent and helpless rests upon society or the state which permits, if not legalizes, the conditions which alone make such criminals possible, but the development of the ideal state in which crime shall be banished or destroyed by

eliminating the causes which produce it is yet beyond our reach. As now constituted, the law ordinarily observes only the overt criminal act of the rational individual and punishes it without attempting to trace the criminal impulse or inclination to its origin. People are born and reared under circumstances varying from wealth, comfort, and wholesome examples and influences on the one hand to poverty, misery, and surroundings of the most unfavorable and corrupting character on the other, but all are made subject to the same law, and each must render to it the same measure of obedience. This is so because such are our human limitations that a finer discrimination and a juster apportionment of responsibility is apparently impossible, until we have reached a higher plane of civilization than has yet been achieved. The appellant has been fairly tried under the law as it exists, and we find nothing in the general merits of the case as disclosed by the record which authorizes us to disturb the verdict or judgment.

While several errors are assigned, the only one argued other than as pertains to the measure of punishment has reference to the alleged misconduct of the prosecuting at-

^{2. SAME:} ^{misconduct} ^{in argument.} torney in argument to the jury. The language objected to was in effect that the death penalty ought to be inflicted because in the event of life imprisonment there was a possibility that appellant might in time be pardoned or paroled. The argument was one which would better have been omitted, and we can conceive of circumstances under which, especially where the case involves other doubtful features, we would be disposed to hold it prejudicial error for the trial court to permit it, but we are united in the view that under the record here presented there is no reasonable probability that the verdict would have been otherwise, had the appellant's objection to the argument been sustained.

No ground has been shown for reversal or for any mitigation or change in the sentence imposed upon the

defendant, and the judgment of the district court is therefore *affirmed*.

**THOMAS R. DAVIS, Appellant, v. THE IOWA CENTRAL
RAILWAY COMPANY.**

Railroads: INJURY TO PASSENGER: CONTRIBUTORY NEGLIGENCE. In this action for injury to plaintiff while riding in the baggage compartment of a combination car there was evidence that passengers were permitted to use the baggage compartment as a smoking room, and it is held that such permission amounted to an implied invitation to so use the room, and that plaintiff was not therefore guilty of contributory negligence as matter of law by being in the compartment for that purpose at the time of his injury.

Appeal from Mahaska District Court.—Hon. K. E. WILCOXSON, Judge.

WEDNESDAY, FEBRUARY 16, 1910.

SUIT to recover damages for a personal injury. There was a directed verdict for the defendant, and from a judgment thereon the plaintiff appeals. *Reversed.*

John F. and Wm. R. Lacey, for appellant.

George W. Seavers, W. H. Bremner, and John O. Malcolm, for appellee.

SHERWIN, J.—The plaintiff was a passenger on one of the defendant's trains which consisted of freight cars and a combination coach for passengers, trainmen, and baggage. The combination coach was in two compartments, one of which was supplied with seats for passengers, and the other was used for baggage, etc. There were several other passengers on the train at the time, and among the

number were two ladies and a baby. The train became stalled in snow, and remained there some time. The conductor and another trainman left the coach, stating as they did so that they were going to help shovel the snow away so that the train could be moved. As they left the coach, the plaintiff and two or three other men went into the baggage room for the purpose of smoking. They had been there fifteen or twenty minutes, when a violent and sudden movement of the combination coach inflicted injuries complained of. A verdict was directed on the ground that the plaintiff was guilty of contributory negligence, and that is the only question argued by the appellee.

There was testimony tending to show that, while the car was thus standing, the plaintiff urinated from one of the side doors thereof, and that just as he turned to leave the door the collision occurred that caused his injuries. There was also evidence tending to show that the baggage compartment of these combination coaches was commonly used by the passengers on the defendant's trains for smoking purposes, and that such use was known to the defendant's employees in charge of its said trains and was acquiesced in by them. It was also shown that the conductor of the train in question knew that the plaintiff and other passengers were in the baggage room when he left the coach just before the accident. If it be true that passengers were generally permitted to use the baggage compartment as a smoking room without objection on the part of the defendant, such permission would amount to an implied invitation to so use it, and under such circumstances it should not be said as a matter of law that the plaintiff was at the time in question guilty of contributory negligence. *Sutherland v. Insurance Co.*, 87 Iowa, 505; *Blake v. Railway Co.*, 89 Iowa, 8; *Quackenbush v. Railway Co.*, 73 Iowa, 458; *Fitch v. Traction Co.*, 124 Iowa, 665; *Jacobus v. Railway Co.*, 20 Minn. 125 (Gil. 110, 18 Am. Rep. 360); *Dunn v. Railway*, 58 Me. 187 (4 Am. Rep. 267). It is said that the plaintiff

was negligent in his use of the side door; but the evidence tends to show that he had at the time attended to the call and turned away from the door. In any view which may be taken of the case, we think the question of contributory negligence was for the jury. The judgment is therefore reversed.

H. G. McMILLAN, Appellant, v. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY AND GREAT NORTHERN RAILWAY COMPANY.

Railroads: Transportation of Live Stock: Negligent Delay: Evidence. The rule that a carrier is not liable for failure to feed and water animals in transit where the same are accompanied by a caretaker, unless it fails to furnish the party in charge with proper facilities for caring for the animals when requested, does not relieve the carrier from liability for negligent delay in transportation which the caretaker can not prevent by the exercise of reasonable diligence. The evidence in this case is held to show unreasonable delay by a connecting carrier.

Same: Connecting Carriers: Agency. The agents of a transfer company taking a car from the initial carrier and switching it to the connecting carrier are also agents of the connecting carrier, in the sense that it is only through them that it can be advised that the car is ready for transportation by it.

Same: Unreasonable Delay: Burden of Proof. The burden of establishing any special excuse for failure to make prompt shipment is upon the carrier.

Same: Connecting Carriers: Duty to Transport. It is the duty of a connecting carrier to receive and transport cars delivered to it without waiting for a new contract of shipment; especially where the carrier did not advise the shipper that it would not transport the same until a new contract was made.

*Appeal from Lyon District Court.—Hon. DAVID MOULD,
Judge.*

FRIDAY, FEBRUARY 18, 1910.

ACTION to recover damages for negligence in the transportation of a horse, the property of plaintiff, resulting in the death of the animal. At the conclusion of the evidence offered for plaintiff, there was a directed verdict in favor of defendants, and from judgment thereon plaintiff appeals.—*Reversed.*

J. M. Parsons, for appellant.

J. L. Kennedy, E. C. Roach, Carroll Wright and J. L. Parrish, for appellees.

McCLAIN, J.—The plaintiff shipped a carload of draft horses from Des Moines, where they had been exhibited at the State Fair, to Hamline, where they were to be exhibited at the Minnesota State Fair, a written contract being entered into with the Rock Island Company for transportation over its line to Minneapolis and delivery of the car there to the proper connecting carrier; the liability of the Rock Island Company being limited to its own line. The evidence tends to show that the car left Des Moines on Friday evening, September 1st, and reached Minneapolis about 1:30 on Sunday morning following, and that without delay it was taken from the Rock Island Company by the Minnesota Transfer Company for the purpose of being switched to the connecting track of the latter company with the defendant the Great Northern Railway Company, by which it was to be transferred to the proper place for unloading at the state fair grounds at Hamline, a suburb of St. Paul; that the proper agent of the Great Northern Company was notified by the agent of the transfer company about 6 o'clock Sunday morning that thirty-five cars, including the car containing plaintiff's horses, were ready to be taken by the Great Northern Company from the transfer track to the fair grounds; that during the forenoon of that day some of the cars destined for the

fair grounds were taken by the Great Northern Company, but that the car containing plaintiff's horses was not removed from the transfer track until the afternoon, and did not reach the place for unloading at the fair grounds until about 3:30 that afternoon; and that by reason of the delay in taking the car from the transfer track to the fair grounds, plaintiff's horses became chilled, and one of them as a result was taken sick and died. The action was for damages accruing to plaintiff by reason of the death of this animal. A verdict directed for the defendant, the Rock Island Company, at the conclusion of the evidence was justified on the ground that there was no evidence tending to show negligence in delivering the car containing plaintiff's horses to the transfer company, which was the connecting carrier, and we find nothing in the argument for appellant requiring a review of this ruling. The argument is directed entirely to the liability of the Great Northern Company.

The contract under which the horses were shipped from Des Moines over the line of the Rock Island Company requires that they be accompanied by some one to take

care of them for the owner, provision for transportation of one or more caretakers being made in the car itself, and two employees of the owner in fact accompanied the animals.

As this contract provides that its conditions should be available to connecting carriers completing the transportation of the property from the terminus of the Rock Island Company to its destination the Great Northern Company was warranted in assuming that caretakers did accompany the horses to feed, water, and look after them, and the argument in this respect for the Great Northern Company is that it should not be held liable for any want of care of the horses to protect them from the effect of becoming chilled, as that duty was imposed by the contract upon the caretakers. It seems to be well settled that under

1. RAILROADS:
transportation
of live stock:
negligent de-
lay: evidence.

such circumstances the carrier is not liable for failure to feed or water animals in course of transportation, unless it fails to furnish to the caretaker in charge of them proper facilities for the purpose when requested, or fails to afford facilities for unloading where unloading becomes necessary for that purpose. *Grieve v. Illinois Central R. Co.*, 104 Iowa, 659. But we think this rule does not relieve the carrier from liability for its negligent delay in transporting the animals to their destination, if such delay has as its proximate result an injury to the animals which the caretaker could not have prevented in the exercise of diligence.

In this case there is evidence tending to show that horses in high condition, such as those usually transported for purposes of exhibition, are likely to become heated while the cars are in motion, owing to nervousness and excitement of the horses due to such motion, and to be chilled when the cars are allowed to stand for a considerable length of time, and that during the fifteen hours elapsing between the delivery of the car containing plaintiff's horses to the transfer track ready to be taken by the Great Northern Company and their final delivery at the fair grounds a few miles away, plaintiff's horses did become chilled, and as a result one of them contracted a cold, from which illness it subsequently died. It also appears that after the Great Northern Company was notified that the car was ready for transfer to the fair grounds its agents were repeatedly urged to hasten the transfer of the car, in order that the horses might be unloaded, and that there was nothing which plaintiff's caretakers could do toward preventing the horses becoming chilled until they could be unloaded at the fair grounds. Conceding the rule to be that the burden of proof is on the plaintiff to show negligent delay on the part of the carrier, and injury therefrom as the proximate result reasonably to be anticipated from the delay, we think

there was enough evidence to take the case to the jury on these questions.

The agents of the transfer company were also agents of the Great Northern in this sense that it was only through the agents of the transfer company that the Great Northern

2. SAME: connecting carriers: agency. Company could be advised that the car was ready for transportation by the latter company to its destination; and, as already stated, the agents of the Great Northern Company were advised without unreasonable delay of that fact. It appears also that the proper employees of the Great Northern Company were personally urged by the employees of plaintiff to facilitate the delivery of the car at the fair grounds, and the jury might have properly found under the evidence that there was an unreasonable delay on the part of the employees of the Great Northern Company in taking the car to the fair grounds as requested. Other cars ready for transfer at the same time were in fact transferred by the Great Northern Company to the fair grounds in a much shorter time.

If there was any special excuse, such as unusual rush of business at the particular time, for not more promptly delivering the car at the fair grounds, it was for the Great

3. SAME: unreasonable delay: burden of proof. Northern Company to show that fact. The evidence in the record tends to negative any such excuse. That the contract would not relieve the carrier from liability for negligence in failing to transport the horses to their destination in a reasonable time is settled in the case of *Grieve v. Illinois Central R. Co.*, already cited, and in *Wisecarver v. Chicago, R. I. & P. R. Co.*, 141 Iowa, 121.

We see no merit in the contention that the Great Northern Company was chargeable with no duty as to the transportation of this car of horses until a new shipping contract was made by it with the owner. A carrier is bound to accept and transport cars delivered to it for

transportation without a special contract, and the car in question was delivered to the Great Northern Company for transportation when it was placed on its transfer track at Minneapolis, and it was notified of that fact. At no time, so far as appears from the evidence, was the plaintiff or any person representing him advised that the car would not be taken by the Great Northern Company until there was a new contract. Its employees undertook to transport the car without such contract, and in fact did transport it; but, as already indicated, the evidence tends to show that there was an unreasonable delay on its part in doing so.

4. SAME:
connecting
carriers:
duty to
transport.

We think that the case should have been submitted to the jury on the evidence as to the liability of the Great Northern Company, and the judgment in favor of that company is *reversed*.

GEORGE DICKSON, Appellant, v. SIOUX CITY TERMINAL RAILWAY COMPANY, Appellee.

Personal injury: SETTLEMENT AND RELEASE: FRAUD: EVIDENCE. To set aside a settlement and release of a claim for personal injury on the ground of fraud, where the person executing the release was well advanced towards recovery, had consulted attorneys, was apparently capable of looking after his own interests and knew that the instrument he signed was a contract of settlement, the evidence of fraud in procuring the release must be clear and satisfactory. In this action the evidence is held insufficient to establish fraud as a matter of law.

Appeal from Woodbury District Court.—Hon. DAVID MOULD, Judge.

TUESDAY, MARCH 8, 1910.

ACTION to recover damages for personal injury. There

was a directed verdict and judgment for the defendant, and plaintiff appeals.—*Affirmed.*

McCormick & McCormick, for appellant.

Parker, Hewitt & Wright and *Shull, Farnsworth & Sammis*, for appellee.

WEAVER, J.—On the 27th of April, 1908, the plaintiff was in the employ of the Cudahy Packing Company at Sioux City. Among his duties were the icing of refrigerator cars, unloading coal, and performing other labor of that general character. The defendant railway company placed the empty cars in position to be iced and hauled them away when loaded. It was the habit of plaintiff and other workmen to deposit their dinner pails upon a platform or upper floor of one of the buildings, and to reach them at noon by climbing over the tops of the cars standing on the track. On the day in question plaintiff had been unloading coal, and at the sounding of the signal at noon quit work, and, climbing on the top of a car standing there, got his dinner pail. He also obtained the pail of a fellow workman, and while handing it down the car was struck by another, which was being backed in upon the side track by a switch engine. The concussion was sufficiently great to throw him from the car and cause the injury of which he complains. On July 20, 1908, plaintiff entered into an agreement with the defendant, acting by its claim agent, one Fisher, whereby he agreed to accept the sum of \$350 in full for all claims arising out of his injury, and said sum was thereupon in fact paid and is still retained by him. This action was begun on December 18, 1908, alleging that plaintiff's injury was occasioned by defendant's negligence and demanding a recovery of damages in the sum of \$10,000. The defendant denied the claim and pleaded the settlement had with plaintiff. In reply plain-

tiff alleges that the settlement was procured by fraud and by the false representation of the claim agent that the company would pay the fees due to his attorneys and to his physician, and that plaintiff's attorneys had recommended or advised him to accept the offered compromise. The trial court, having heard the evidence, sustained a motion to direct a verdict in defendant's favor.

As the settlement stands admitted, it must prevent any recovery by plaintiff unless he has made a showing of facts from which the jury would be justified in finding that it was procured by fraud as alleged in the reply. A careful examination of the record discloses an entire failure of proof in this respect. The plaintiff's testimony on this point, as shown by his own abstract, is as follows:

On the 20th day of July, 1908, I executed a release of this obligation. It was to one C. B. Fisher, who came to me and represented himself as a claim agent. He came to where I roomed in Sioux City. I told him that we would go up and see my attorneys; and he said that he did not want to see them, as he had seen them. He said that he had just come to have a little talk with me. There was nobody else present. He first offered me \$250, and said he would give me what it would cost to take the matter to the Supreme Court. I told him that I would not take it, that I ought to have several thousand dollars. He then said that my attorneys said for me to take \$350, and that is all I could get, all that I would ever get out of it. He told me that I would get this much out of it and have all my bills paid. When he made me this offer and stated my attorneys had said that, I told him that if that was what they said I supposed I would have to take it. At his suggestion we then went to the Exchange building at the stockyards. We took a street car, which passed where I roomed. We reached the Exchange building in about ten minutes. There I executed a release for Fisher, and he paid me the \$350. That evening I went to my folks in Missouri. I did not pay any of my bills. I first learned that Fisher had made misrepresentations to me about ten days after, through Vernon, a lawyer at the town where I went. I

had him take up the matter with McCormick & McCormick. I believed this man Fisher when he made 'he representations to me, and I believed him when he told me that my attorneys said for me to take \$350, as that was all that I could get out of it. If he had not made those statements and representations to me, I would not have made that settlement. At the time he made them I did not know that they were false.

Assuming that the representations were made to him as alleged, it was incumbent upon plaintiff to prove that they were untrue. His only knowledge that they were false he claimed to have received as a matter of hearsay from one Vernon, who is not a witness. The only other evidence in this respect is given by one of the members of the firm of attorneys having charge of his interests, and this partner testified as follows: "I am now, and was on and prior to the 20th day of July, 1908, the attorney in this case for plaintiff. Neither at that time, prior thereto, nor since, have I talked with C. B. Fisher in regard to this case. He never came to see me nor the firm in regard to it or the settlement." The other member of the firm did not appear as a witness.

It is hardly necessary to say that this is not sufficient to raise an issue for the jury. Everything testified to by plaintiff or his counsel may be literally true, and yet the claim agent, Fisher, may have had with the other member or members of the firm the very conversation which plaintiff says Fisher pretended to repeat to him. This contract of settlement was not one obtained by a claim agent obtruding himself upon a sufferer before he had recovered from the first shock or depression occasioned by his injury. It was nearly three months after the accident; he was well advanced on the road to recovery; he had consulted counsel; and he admits that he knew that the paper he signed was a contract of settlement. Fraud in its procurement will not be presumed under such circumstances.

It must be proved, and that, too, by something more than ambiguous denials and repetitions of hearsay. While we are ready at all times to set aside settlements obtained by undue advantage, deception, and fraud, those which are made by sane men under no constraint of bodily or mental suffering and to all appearances capable of caring for their own interests should be upheld, unless we are to repudiate the fundamental principles which underlie the law of contracts. A verdict avoiding the agreement in this case on the plea of fraud would have to be set aside as without sufficient support in the evidence.

This conclusion renders it unnecessary for us to consider other issues raised or other points made in argument.

For the reasons stated, the judgment of the district court is *affirmed*.

W. B. COLLINS, Appellant, v. THE CITY OF KEOKUK,
Appellee.

Appeal: FAILURE TO DISCLOSE ERROR: AFFIRMANCE OF RULING. An order striking certain paragraphs from a petition will be affirmed on appeal where the matter pleaded in the paragraphs not stricken is not shown in the abstract; since by failure to disclose the same the court is unable to determine whether the party appealing was injured by the ruling.

Municipal corporations: NUISANCE: ABATEMENT: PLEADING. An individual citizen can not abate a public nuisance unless he shows some injury or prejudice peculiar to himself and other than that suffered by the inhabitants generally.

Same: ACTION TO COMPEL TAX LEVY: PLEADING. Nor can he compel a levy of municipal taxes unless he shows some special injury by failure to make the levy, and that the municipality at large will suffer from the omission.

*Appeal from Lee District Court.—HON. HENRY BANK, JR.,
Judge.*

WEDNESDAY, MARCH 9, 1910.

THE opinion states the case. Order *affirmed*.

W. B. Collins, pro se.

A. T. Marshall, for appellee.

WEAVER, J.—Plaintiff's alleged cause of action was stated in an amended petition in equity of ten paragraphs, to which defendant filed a general demurrer. In ruling thereon the demurrer appears to have been treated as a motion to strike, and was sustained as to all the paragraphs except those numbered one, two and six, and, defendant declining further to plead, an order was entered that "paragraphs three, four, five, seven, eight, nine and ten are stricken out and dismissed," and from this order plaintiff has appealed.

The abstract makes no showing whatever as to the allegations of paragraphs one, two and six, which the court allowed to stand. The paragraphs stricken out are in substance as follows: (3) That the city clerk neglects to comply with the law which requires him to keep accurate and detailed account of the income and expenditures of the municipality. (4) That the city treasurer neglects to comply with the law requiring him to keep accurate accounts of the moneys received and paid out by him and to make monthly and quarterly reports. (5) That two named streets are out of repair. (7) That on July 1, 1909, the city by proper vote of its electors abandoned its special charter, and adopted the commission form of government. (8) That the city council, though requested by plaintiff so to do, has neglected to levy taxes for the ensuing year as required by the statute. (9) That while acting under special charter the city levied and collected taxes for the current year, and not for the ensuing year as other taxes are levied; but un-

der the commission plan taxes must be certified to the county auditor and entered upon the tax books of the county, and be collected by the county treasurer. (10) That the city allows and permits its streets in four different locations named to be obstructed by "lunch stands, booths, sheds, and buildings on wheels," and neglects to remove the same, though requested by plaintiff so to do. The prayer to the petition is in these words: "Wherefore plaintiff prays the order, judgment and decree of court to restrain and enjoin the defendant, its city council, officers, agents, employees, and servants to permit or allow the streets to be obstructed by booths, lunch stands, lunch wagons, structures or buildings, on wheels or otherwise; to longer delay in levying taxes for 1910, and have the same certified to the county auditor; to longer proceed under the special charter, but act under chapter 14, Supplement to the Code, and amendments; to allow the streets to remain out of repair, and such other and further relief as the facts will warrant and justify and to equity and good conscience belongs and costs."

As counsel has not favored us with any statement or suggestion as to the matter pleaded in the three paragraphs not stricken from the petition, we are unable to tell whether

i. **APPEAL:** **failure to disclose error:** **affirmance of ruling.** the elimination of the other seven paragraphs works his client any injury. For all we can tell from the record here disclosed,

the portion of the petition which the court allowed to stand may contain everything necessary to be alleged to entitle plaintiff to the relief demanded. We can not presume error in the ruling. It must affirmatively appear.

Upon the showing made, it is not necessary that we go further to justify an affirmance of the order appealed from. It may be said, however, that the petition, so far as it is given in the abstract, is a somewhat remarkable feat of mosaic art in pleading. It combines in one array an alleged

cause of action against the city clerk for neglect of duty; another against the city treasurer for a similar
2. **MUNICIPAL CORPORATIONS:** breach of his official trust; another against nuisance: the city to compel the repair of the "holes, abatement: pleading. depressions and uneven surface" of certain streets; another in the nature of mandamus to command the city council to proceed with the levy of taxes, and still another to require the city to abate four distinct and separate nuisances. The prayer of the petition asks no relief whatever against either clerk or treasurer. As to the condition of the streets complained of and as to the obstruction of others by "lunch stands, booths, and buildings on wheels," there is not an allegation of a single fact showing injury or prejudice to the plaintiff therefrom other or different from that which is suffered by the inhabitants of the city in general, and it is elementary that under such circumstances an action by an individual citizen to abate a nuisance will not lie.

To the demand for the levy of taxes, the same objection is pertinent. If plaintiff has sustained any special injury by the failure to make the levy, he does not suggest

3. **SAME: action to compel tax levy: pleading.** it. Nor does he make any allegation that the city at large will suffer prejudice from such omission. The city treasury may be full and overflowing with funds, and no tax be needed. Such a condition may be phenomenal, but we can not say it is legally impossible.

No error is shown by the record, and the ruling of the district court is *affirmed*.

G. W. RIDINGS AND F. M. RIDINGS, Appellants, v. THE MARENGO SAVINGS BANK, MARENGO, IOWA, Appellee.

Mortgages: ABSOLUTE DEED AS A MORTGAGE: BURDEN OF PROOF: EVIDENCE. To declare a deed absolute in form with covenants of warranty to be a mortgage, the evidence that it was given as

security simply must be clear, satisfactory and convincing; the important questions being whether there was a continuing obligation on the part of the grantor to pay a debt which it is claimed the deed was made to secure; the relative value of the land as compared with the debt; how the parties treated the conveyance; the form of the written evidence of the transaction; and the character of the testimony relied on to show that the deed was accepted as security. In this action the evidence is held insufficient to sustain the plaintiff's contention that the deed in question was given merely as security.

*Appeal from Iowa District Court.—Hon. R. P. Howell,
Judge.*

THURSDAY, MARCH 10, 1910.

Suit in equity to have a deed declared to be a mortgage, for an accounting, and fixing a period for redemption. The trial court dismissed the petition, and plaintiffs appeal.—*Affirmed.*

Thos. H. Milner and Thos. Stapleton, for appellants.

C. Hedges and Popham & Havner, for appellee.

DEEMER, C. J.—Plaintiff G. W. Ridings is and at all times material to our inquiry has been a resident of the city of Chicago. The other plaintiff, F. M. Ridings, was a resident and citizen of Iowa county, this state. The latter was a customer of the defendant bank and a large borrower therefrom. Shortly before the deed in question was made, F. M. Ridings was largely indebted to the bank, both on notes and overdrafts, and the cashier of said bank was anxious to get these loans paid or secured and the account put on a different basis. It is claimed that G. W. Ridings, who is a brother of F. M. Ridings, was asked to come to Marengo, Iowa, to help straighten out F. M.'s account; that he went there in March of the year 1903, and with the cashier of the bank made an arrangement whereby, among

other things, he, G. W., was to execute and deliver to the bank an absolute deed for certain real estate in the state of North Dakota as security for the indebtedness owing the bank by F. M. Ridings. It is claimed that it was the thought of all parties in interest that with this assistance F. M. Ridings could pull through, pay his indebtedness to the bank, and that, when this was done, the North Dakota land should be redeeded to G. W. Ridings. Accordingly on March 26, 1903, G. W. Ridings made, executed, and delivered to defendant a warranty deed for a section of land in North Dakota. This deed was duly recorded in the proper county April 6, 1903. After the making of the deed, the south half of the section was conveyed by the bank to a party at Rowley, Iowa, for a stock of merchandise, and F. M. Ridings or the two plaintiffs under the name of Ridings Bros. took possession of the stock of goods and handled and disposed of the same, accounting to defendant for the sum of \$3,500 on account thereof. It is contended that the deed of the North Dakota land to the bank was intended as security for \$7,000 of the indebtedness of F. M. Ridings to the bank; that the sale or exchange of the south half of the land was made by the Ridings, and that the bank received \$3,500 of the proceeds of the goods received for the land; that but \$3,500 of the original debt which the deed was made to secure remains unpaid; and that upon an accounting a considerably less sum is due the bank. An accounting is asked and a decree declaring the deed to be a mortgage and plaintiffs given the right to redeem the land upon payment of the amount found due. In brief, this is the claim made for appellants.

Defendant denies that the deed was intended as security, and insists that it should not be declared to be a mortgage. It says that the land was taken in satisfaction of \$7,000 of the indebtedness of F. M. Ridings to the bank, that it was taken at practically the full value of the land, and that the only collateral agreement with reference there-

to was that plaintiffs should have the management of the land and the right to sell the same until March 1, 1904. If in the meantime the land was sold for more than the bank gave for it, the excess should be credited upon any other account which F. M. Ridings at that time had, and, if there was no indebtedness at that time, the excess was to be paid to the Ridings or to F. M. Ridings as his commission for the sale of the land. Thus a square issue is presented regarding the nature of the original transaction. The deed being absolute in form with covenants of warranty, the burden is upon plaintiff to show by clear, satisfactory and convincing evidence that, although absolute in form, the conveyance was intended to be a mortgage. *Hyatt v. Cochran*, 37 Iowa, 309; *Robertson v. Moline Co.*, 106 Iowa, 414; *England v. England*, 94 Iowa, 716, and cases cited.

And in arriving at a proper solution of the issues presented the most important questions to be considered are: (1) Was there a continuing obligation on the part of the grantor to pay a debt which it is claimed the deed was made to secure? (2) What was the value of the land as compared with the indebtedness which the deed was made to extinguish or secure? (3) How have the parties treated the conveyance? (4) In what form are the written evidences in the transaction? (5) What sort of testimony is relied upon to show that the deed was intended for and accepted as security for a loan or existing indebtedness? These propositions are so fundamental that there is no need of citing authorities in their support. Indeed, the only serious questions in the case are of fact. We have read and reread the record with care and from a perusal thereof conclude: (1) Just prior to the making of the deed F. M. Ridings was indebted to the bank in the sum of nearly \$44,000, and the officers of the bank were anxious to have this indebtedness reduced, paid, or secured. G. W. Ridings authorized his brother, F. M., to use the North Dakota land in adjusting this indebtedness. F. M. appeared be-

fore the cashier and the board of directors, and we are satisfied that an arrangement was made whereby the bank was to take the land which was then mortgaged to secure a debt of over \$5,000 at the sum of \$7,000, and that F. M. should be given credit for that amount upon the books of the bank, the bank assuming the mortgage upon the land. As F. M. Ridings was then insisting that the land was worth more than the bank gave for it, it was arranged that he and his brother should have the right to sell the land at any time within one year, and, if they sold so as to net the bank more than the \$7,000, F. M. Ridings was to have credit for the overplus upon his other indebtedness to the bank, and, if he was not indebted to the bank at that time, the overplus should be paid to the Ridings as a commission for the sale of the land. We are constrained to hold under the testimony that \$7,000 of F. M. Ridings' indebtedness to the bank was absolutely satisfied by the conveyance of the land.

Plaintiffs' testimony as to the debt secured or intended to be secured is very uncertain and unsatisfactory. In their pleadings and according to some of the testimony the deed was given to secure all of F. M. Ridings' indebtedness. If that be true, there is no need to further consider the case, for the reason that according to the undisputed testimony Ridings' indebtedness at this time amounts to many times the present value of the remaining land after giving them credit for everything to which they, under any theory of the case, would be entitled. The bank treated the deed as absolutely extinguishing \$7,000 of F. M. Ridings' indebtedness, and, as no sale was made by either of the plaintiffs, except as part of the land was exchanged for the property at Rowley, their rights to this remaining property have been fully extinguished. According to the better testimony the land was not worth more than the bank agreed to give for it. G. M. Ridings himself testified that, when the deed was made to the bank, the land was not worth to exceed \$12,500. This is what the bank took it for, and there is nothing in

the value of the land which indicates that the bank took it as security. Indeed, the contrary is indicated.

The conduct of the parties after the execution of the deed is strongly relied upon by plaintiffs, and this is the only thing in the case which gives any color to their claims. When it is remembered that plaintiffs or F. M. Ridings were given the management of the farm and one year within which to sell the land, most, if not all, of the circumstances relied upon by plaintiffs as showing that the deed was intended as a mortgage become clear, and are not inconsistent with the thought that the conveyance was intended as an absolute one. It is true that plaintiffs had the management of the land for one year, and that they received the rentals for the years 1903 and 1904, but, as plaintiffs represented to the bank that the land was wild and unimproved and none of the officials knew anything to the contrary, the fact that plaintiffs received the rentals for the years stated should not be regarded as controlling. In a letter written by F. M. Ridings to the cashier of defendant bank under date of March 15, 1905, he stated: "I understood that up to March 1, 1905, we had exclusive sale and management of the land referred to, and after March 1st the management went to you, and, unless I hear to the contrary at once, will understand that you want us to push a sale or trade of this property as rapidly as possible. It would be only natural for us to await your advice and instructions after March 1st. We must have some idea as to your wishes in the matter, viz.: If you will trade for flat property—residence or store buildings, price of land, etc.—we must have some outline in the matter."

We have already referred to the exchange of the south half of the section of land. That was negotiated by the plaintiffs or by F. M. Ridings, but the deed was, of course, made by the defendant bank. The title to the property received in the trade was taken in the name of the bank, but plaintiffs took possession of the goods received, and finally

closed them out, the bank making a bill of sale of the goods to the purchasers. In a letter written to the bank of Rowley which was the intermediary between these parties, Henderson, the cashier of the bank, wrote that the bank owned the entire section of land. The deed to the south half of the section was made June 8, 1904, and on July 7th of the same year the bank made a bill of sale of the goods received in exchange for the expressed consideration of \$3,888. Although the business connected with the handling and selling of this stock of goods was conducted by plaintiffs under the name of Ridings Bros., they did business with a bank at Rowley, and finally and fully accounted to the defendant bank. It seems that Ridings was allowed something like \$385 as his commission on this transaction, and that the bank received on account of this deal approximately \$3,500; about one-half of the mortgage indebtedness against the entire section also being taken care of. The fact that the bank received net approximately \$3,500 for half the land and a release of substantially one-half the mortgage indebtedness, and the further fact that Ridings received the remainder of the returns growing out of the exchange, is quite significant. The written evidence of the transaction, the entries upon the books of the bank, the correspondence between the parties, and their conduct generally with reference to the land, save as heretofore indicated, show that the transaction was as defendant claims it to have been. It is true that F. M. Ridings and the then cashier of the bank testify that the deed was taken as security, and was not intended to be an absolute conveyance, but the entries made by the cashier upon the books of the bank, the correspondence between the parties, and their subsequent dealings indicate that the deed was taken as an absolute conveyance, and that the plaintiffs had no other rights with reference to the property after the deed was made than to manage it for one year and within that period to sell it,

securing to themselves the advantage of any price they might obtain over and above \$18 per acre.

The testimony adduced by plaintiffs is not of that satisfactory character which is required in such cases. Even if G. W. Ridings were present when the transaction was consummated, which is very doubtful to say the least, and we take his testimony as to the agreement had at that time, we should be constrained to hold that plaintiffs are not entitled to the relief demanded or to any other relief which would be of any advantage. G. W. Ridings says that the deed was given as security for all of F. M. Ridings' indebtedness. If that be true, then, as it appears without contradiction that F. M. Ridings is now indebted to the bank for a sum very much greater than the value of the north half of the land, and there is no offer on plaintiffs' part to take up the whole of this indebtedness, but merely to pay \$3,500 or less of the claim against F. M. Ridings, they are not entitled to the relief demanded.

We are satisfied with the decree of the trial court, and it is *affirmed*.

JOHN ROBINSON, Appellee, v. MARY ROBINSON, Appellant.

Negotiable instruments: ACTION UPON NOTE: CONSIDERATION: INSTRUCTION. In this action a divorced husband is seeking to recover on a renewal note given by his wife for a balance claimed to be due in consideration of a relinquishment of his claim to property in her name, and for refraining from contesting the divorce. *Held*, an instruction that if defendant obtained a divorce it is presumed that it was lawfully granted on sufficient evidence, and that plaintiff's promise not to resist the action for divorce constituted no part of the consideration for the note, and that neither partial payment on the note in suit nor the fact that it was a renewal would impart or establish a consideration therefore, was proper.

Same: RENEWAL NOTE: CONSIDERATION. Where a promissory note is treated by the parties either as valid or as questionable, and for the purpose of securing an extension of time to avoid lit-

gation and settle the rights and obligations of the parties a new note is given, such renewal note is supported by a valid consideration. Under the evidence it is held that the question of whether defendant gave the note in suit to avoid litigation and to settle the supposed or claimed rights of the parties was for the jury.

Appeal from Hamilton District Court.—Hon. R. M. Wright, Judge.

SATURDAY, MARCH 12, 1910.

ACTION at law upon a promissory note made and executed to plaintiff, by him indorsed to Robert Fullerton, and by Fullerton reindorsed without recourse to plaintiff. Defendant admitted the execution of the note, but pleaded want of consideration therefor. She also pleaded that plaintiff did not own the note and was not the real party in interest. On the issues joined the case was tried to a jury, resulting in a verdict and judgment for plaintiff, and defendant appeals.—*Affirmed.*

Wesley Martin, for appellant.

G. F. Tucker and D. C. Chase, for appellee.

DEEMER, C. J.—Plaintiff and defendant were at one time husband and wife. They were divorced some time in the year 1906, and just prior to the divorce defendant gave plaintiff two notes for \$1,000 each. At that time some farm land was in the defendant's name, and she claims that she gave plaintiff the notes on his promise to join in deeds to the farm land, so that she might handle the same. Thereafter, in settlement of these two notes, defendant paid plaintiff \$200 in cash, and executed the note in suit for the remainder. On cross-examination of this witness it appeared that one reason for the giving of the original notes was to

secure plaintiff's promise not to contest the divorce suit, which it appears he did not do. The negotiations leading up to the execution of the notes were conducted by a son, and he testified on the witness stand as follows:

Reside upon a homestead in Edinburg, N. D. I am the son of Mr. and Mrs. Robinson. I was living with my mother in this city at the time the notes for \$2,000 were given. My father was at Marshalltown in the Soldiers' Home. I went down to visit him. We wanted to get the farm so we could transfer it, and he said that he had something coming, and, if he didn't get something more out of it, he would see that my mother didn't get much out of it. He told me that. This was previous to the divorce proceedings. He threatened to oppose that—I don't know on what ground—and make her lose most of the property. . . .

I think my mother knew what my errand to Marshalltown was. We talked this matter over a great many times. I told her what I was going for, and, after I got back, I told her what the result was. I think my father agreed to come to Webster City and make a settlement for \$2,000. He agreed at that time not to appear against her on condition that she would give him \$2,000. A buyer was not found until after the divorce was granted. My errand down there was to get him not to appear against my mother on condition that he was to receive \$2,000 out of it. At the time of the giving of the two \$1,000 notes, the farm down there and the house and lot here in town stood in my mother's name. Q. So that, when the divorce proceeding was granted, all he got out of his interest in that property was two notes of \$1,000 each. That is right, isn't it? (Defendant objects as immaterial, and assuming something that the witness did not understand. He had no interest in the property, and the testimony is incompetent, immaterial and irrelevant. Overruled, and defendant excepts.) A. Yes, sir. I got one of the notes. My mother since paid me a part of it. I surrendered it to her. I surrendered it possibly the same day I got it. She gave me \$500. I didn't consider that she was indebted to me. I surrendered the note before I got the \$500. I didn't get it all at one time. . . . My father insisted when I went down to Marshalltown to see him that he should have something out of the property, or

else he would appear against her and contest the divorce proceeding.

This is all the testimony offered by the defendant upon the issues tendered. Plaintiff testified, in substance, that the original notes were given in settlement and adjustment of his property rights in the divorce proceedings, and that the note in suit was given in settlement of his claims on the original notes.

On the issues and the testimony, the trial court gave the following, among other instructions:

(6) If you find from a preponderance of the evidence that the sole consideration for the original \$1,000 note was the promise of the plaintiff not to resist the granting of the divorce which defendant was seeking to obtain from him, you are instructed that such consideration was what is termed an incompetent consideration, which in law is no consideration at all.

(7) If you find from a preponderance of the evidence that defendant obtained a divorce from the plaintiff, it will be presumed that the same was obtained on adequate and sufficient evidence, and that she was in law entitled to a divorce, and that the plaintiff's promise, if any he made, that he would not resist the defendant's application for a divorce, was of no value, and could not form a consideration for the making of the \$1,000 note executed by the defendant to plaintiff.

(8) If you find from a preponderance of the evidence that the two \$1,000 notes were given without consideration, the mere fact, if it be a fact, that the note sued on was given as a renewal of one of the \$1,000 notes, would not by that fact alone impart a consideration to the note sued on in this case, and in such case your verdict should be in favor of the defendant.

(9) You are further instructed that the mere fact, if it be a fact, that the defendant paid \$200 on the \$1,000 note, would not alone in and of itself prove that the note in suit was supported by any valid consideration.

(10½) If you find from a preponderance of the evidence that at the time the \$200 were paid on the \$1,000

note the validity of the \$1,000 note was in the minds of the parties either as a valid claim, or it was a question in their minds whether or not it was a valid claim, and in order to get an extension of time to avoid litigation, and in order to settle the supposed or claimed rights of the parties in the \$1,000 note, the defendant executed and delivered the note in suit, then in such case you would be warranted in finding that the note sued on is supported by a valid consideration.

These instructions are complained of, and it is also insisted that under the undisputed testimony there should have been a verdict for defendant. Aside from instruction No. 10½, the charge is even more favorable to defendant than she was entitled to, and there is no just cause for complaint on this score. Instruction No. 10½ is undoubtedly correct as an abstract proposition. *Rowe v. Barnes*, 101 Iowa, 302; *French v. French*, 84 Iowa, 659; *Adams v. Adams*, 70 Iowa, 253; *Brannum v. O'Connor*, 77 Iowa, 632; *Harlan v. Harlan*, 102 Iowa, 701. There was ample testimony to take the case to a jury upon this proposition. Mr. Robinson testified on the trial, and it was not denied, that the first arrangement was that he, Robinson, was to have a provision for \$2,000 inserted in the decree as alimony, if the court would carry out the division along that line in case of divorce; but, on the suggestion of Mr. Martin to avoid certain unjust claims, he was advised to accept the notes in lieu of this alimony, and he did so. The first note was paid, and, when the second became due or soon thereafter, plaintiff, who was in straightened circumstances, and needed the money, procured the good offices of an old friend of the family, Mr. Robert Fullerton, who interviewed Mrs. Robinson as to the payment of the note, and suggested to her that her husband would enforce collection. She then paid \$200 on the note, and gave another note for the balance and accrued interest, and this latter note is the note sued on in the present action. Mr. Fullerton testi-

fied: "Mrs. Robinson stated to him that she was hard up, and that, if Mr. Robinson would give her time, she would pay \$200 if Mr. Robinson would give her time on the balance. She asked for time; said she would not be able to pay this until she disposed of her place. 'I did what I could to get Mr. Robinson to give her time. She finally paid \$200, and I took a note on the time she asked for the balance. It was satisfactory to her. I was a mutual friend. I never had any interest in the matter, only to keep peace in the family.'"

Surely this was sufficient to justify the instruction and the verdict. The judgment must be, and it is, *affirmed.*

JAMES DERMEDY v. D. V. JACKSON, JUDGE, SEVENTH JUDICIAL DISTRICT OF IOWA.

Intoxicating liquors: INJUNCTION: SCOPE OF DECREE: CONSTRUCTIVE NOTICE. A decree restraining the sale of liquor in a certain place which in terms enjoins the defendant and all persons claiming through or under him, and all other persons, and the building as a place for the illegal sale and keeping of intoxicants, is sufficiently broad in its terms to prohibit all persons from maintaining a nuisance on the premises; and is sufficient as a public record to impart constructive notice to all persons.

Same: CONTEMPT: INFORMATION: WHO MAY FILE SAME: PROSECUTION.

2 It is not essential that the information in contempt proceedings for the violation of an injunction be filed by the plaintiff in the original action; nor is it essential that the county attorney appear and prosecute the contempt proceeding.

Contempt: TITLE OF PROCEEDING. The title of a contempt proceeding 3 is not very material; it may be under the title of the cause to which it is incident, or it may be in the name of the state against the defendant.

Decree of court: SIGNATURE OF JUDGE. A decree of court in fact 4 signed by the judge is not invalid because his signature is not accompanied with his official designation.

Intoxicating liquor: INJUNCTION: DECREE: CONFORMITY WITH PETI-

5 TION. A petition asking that a building be enjoined as a place
for the sale or keeping for sale of liquor in violation of law,
and such other relief as petitioner may be entitled to, is broad
enough to support a decree enjoining defendants from using
the building for the sale or keeping for sale of liquor, or per-
mitting it to be done by persons under their control; and to
enjoin the building as a nuisance and as a place for the illegal
keeping and sale of intoxicants.

Same: INJUNCTION: CONTEMPT: IDENTITY OF PREMISES. Where the
6 description of premises in a contempt proceeding is by lot and
block, the same as in the action to enjoin the nuisance, there
is a sufficient identity of the premises although there may be a
discrepancy in the name of the building. But were this not true
the effect of the claimed discrepancy can not be raised for the
first time on appeal.

Of the certification and filing of evidence. The return and Judge's
7 certificate in a contempt proceeding for the violation of an in-
junction are conclusive as to the date of filing the evidence by
the reporter, although his certificate shows that the same was
filed on a different date.

Certiorari to Muscatine District Court.

MONDAY, MARCH 14, 1910.

THERE was a contempt proceeding against plaintiff
for the violation of an alleged liquor injunction. The
plaintiff was found guilty, and fine and imprisonment were
imposed. He has sued out a writ of certiorari in the na-
ture of an appeal from such order.—*Affirmed.*

J. G. Kammerer and E. F. Richman, for petitioner.

Betty & Betty, for defendant.

EVANS, J.—One Orr filed information against the de-
fendant charging him with the violation of a liquor injunc-
tion entered some years ago in the case of Kessinger against
First National Bank and others, a suit to which the in-
formant Orr was not a party. Nor was the defendant a

party to such suit. The decree of injunction in such previous case provided, among other things, that the defendants and "each of them are further enjoined from using said building or premises or any part thereof as a place for the sale or keeping for sale of intoxicating liquors in violation of law, or permitting the same to be done by any other person or persons under their control, and said building and premises are hereby enjoined as a nuisance and as a place for the illegal sale and keeping for sale of intoxicating liquors and against the use therefor by said defendants and any person or persons claiming by, through, or under them or either of them, and all other persons."

I. That the defendant kept and sold intoxicating liquors upon the premises described in the information is undisputed. It is urged in his behalf that it is not proven

i. INTOXICATING
LIQUORS:
injunction:
scope of
decree:
constructive
notice.

that he had notice of the previous injunction. The proceeding was for contempt of court. It was sufficient for the informant to show that he violated the terms of the injunctive decree. Upon the filing of the information defendant was summoned into court to show cause why he should not be punished. Whether ignorance of the decree would have been a good showing of excuse or defense we have no occasion to determine. No such excuse or defense was offered either by pleading or evidence. The decree was sufficiently broad in its terms to enjoin all persons from maintaining a nuisance on the premises described therein, and it was sufficient as a public record to impart constructive notice to all persons. *Silver v. Traverse*, 82 Iowa, 52. It is urged by the defendant that the cited case is inconsistent with the later case of *Ruhlman v. Humphrey*, 86 Iowa, 602. But the opinion in the latter case points out the clear distinction between the two cases. The same distinction was recognized in the later case of *Newcomer v. Tucker*, 89 Iowa, 487. In the two later cases the decree under consideration only purported to enjoin the

particular defendant in that case, and the petitioners were discharged because they were not included in the terms of the decree alleged to be violated. Such point is not available to the petitioner in this case.

II. It is urged that the information was void and of no effect because the informant Orr was not a party to the original case, and because this proceeding was entitled in

2. SAME: contempt: information: who may file same: prosecution.

the name of the State of Iowa against the defendant, and because the informant Orr was not authorized to represent the State of Iowa in such proceedings. It is not essential that information for contempt should be filed by the original plaintiff. The original plaintiff acted only in the public behalf. The same public is represented by the informant. Nor is it essential that the county attorney should appear in the prosecution of a contempt case. *First Congregational Church v. Muscatine*, 2 Iowa, 69; *Fisher v. Cass County Court*, 75 Iowa, 232; *Brennan v. Roberts*, 125 Iowa, 615. The fact that the proceeding was prosecuted in the name of the State of Iowa furnishes to the defendant no ground of complaint.

Just what title should be borne by a contempt proceeding is a question which has never been definitely settled in this state, nor has it ever been deemed as very ma-

terial. *Manderscheid v. District Court*, 69

3. CONTEMPT: title of proceeding. Iowa, 240; *Hatlestad v. District Court*, 137 Iowa, 146, and cases cited, *supra*. The of-

fense charged is an offense against the authority of the court. It may be heard under the title of the case to which it is incident, or it may be entitled in the name of the state against the defendant. The only purpose of attaching any title to the matter is that the proceedings therein may be identified and separated from other proceedings. Such contempt proceedings are instituted under section 2407 of the Code. This section requires that there be filed with the clerk of the court an "information under

oath setting out the alleged facts constituting such violation." The statute does not provide how such proceedings shall be entitled, nor does it provide by whom the information shall be made. The information in the case at bar is in accord with the statute in question.

III. It is urged by defendant that the previous decree the violation of which is charged against him is void in so far as it affects him for two reasons. The first of these is that the decree as entered of record purports to be signed by P. B. Wolfe, and does not purport to be signed by any judge of the seventh judicial district. It is conceded that P. B. Wolfe was one of the judges of the seventh judicial district at the time of the entry of such decree. But it is claimed that his signature is not accompanied with his official designation, and that this is fatal to the decree as such. We see no merit in this contention. The record of the decree was sufficient without any signature of the judge thereto. The provision of the statute in this regard is directory only. *Childs v. McChesney*, 20 Iowa, 431; *Donnelly v. Smith*, 128 Iowa, 260.

The second reason urged against such previous decree is that its injunctional provisions were much broader than the petition upon which the decree was rendered, and that

5. ~~INTOXICATING LIQUOR: injunction: decree: conformity with petition.~~ the court had no jurisdiction to grant more relief than was prayed. This point is not sustained by the record. The petition in question prays "that said building and the realty hereinbefore described be enjoined as a place for the sale or keeping for sale of intoxicating liquors in violation of law and that he may have such other relief as he may be found entitled to." This prayer is broad enough to sustain all the terms of the decree as entered.

IV. It is urged that there was no proof that plaintiff sold intoxicating liquors upon the same premises as those described in the previous decree. It is shown by the pres-

ent record that the place of illegal sale by the plaintiff was lot six, block thirteen, in the city of Muscatine. The previous decree covered the same description. The apparent discrepancy arises out of the fact that the previous decree described the building by name as Hotel Grand, while the present information describes it by name as Hotel Webster. Whether this apparent discrepancy arises out of a change of names or not the record is silent. The point is raised for the first time in this court. In the trial court plaintiff filed a motion for discharge upon ten specific grounds, none of which included any reference to the apparent discrepancy which is now urged upon our attention. Inasmuch as the description of the real estate is definite and controlling, and is the same in both proceedings, we think the identity of the premises is presumptively established thereby, notwithstanding the discrepancy in names.

V. It is urged that the warrant of commitment issued by the court was void because the same was issued before the shorthand notes of the evidence were filed and made of record. This argument is accompanied with an alleged statement of facts which do not appear in the abstract. It is said in the argument that the plaintiff was imprisoned on June 5th, and that the notes were not filed until June 8th. It does not appear from the abstract when judgment was entered by the court. Out of abundance of caution we have referred to the original return to the writ filed in this case, and we learn therefrom that judgment was entered on June 5th, and that the shorthand notes of the evidence were made of record the same day. It is true that the certificate of the shorthand reporter states that the notes were filed on June 8th. The return and certificate of the judge is controlling here. If any mistake has been made in the record below, it should be corrected by proper proceedings there. It may be said, also, that this action of the court was in

6. SAME:
injunction:
contempt:
identity of
premises.

7. OF THE CERTIFICATION AND FILING OF EVIDENCE.

no manner challenged in the original petition for the writ. It was first challenged by an amended petition filed after the case had been fully argued and ready for submission. We find no illegality in the action of the lower court, and its order is *affirmed*.

O. A. PHELAN v. BOONE GAS COMPANY, Appellant.

Public service corporation: RIGHTS AND DUTIES IN SUPPLYING GAS TO CONSUMERS. It is the duty of a gas company operating under a franchise to supply all inhabitants of the municipality with gas on the same terms, where the conditions are the same or similar. The company may, however, adopt reasonable rules and regulations fixing the terms upon which it will supply its customers with gas, but the adoption of a formal rule is not essential to that end, where there is a well established and governing custom. It can not, however, enforce an arbitrary or discriminating rule or custom according to its whim or caprice. In this action to compel the gas company to supply plaintiff with gas the evidence is held to show that the service was cut off without just reason for believing plaintiff financially irresponsible.

Appeal from Boone District Court. Hon. ROBERT M. WRIGHT, Judge.

MONDAY, MARCH 14, 1910.

ACTION in mandamus to require defendant to reinstate a meter in plaintiff's house and supply him with gas resulted in judgment as prayed. The defendant appeals.
Affirmed.

Dyer & Hull, for appellant.

Ganoe & Ganoe, for appellee.

LADD, J.—The defendant is a corporation engaged in

manufacturing and selling gas to the people of Boone under a franchise granted by that city. One of its mains is laid in the street immediately in front of plaintiff's premises, and for more than a year prior to July 20, 1908, it had supplied the same with gas in the manner customary with its patrons. On that day, owing to differences concerning the company's account it removed the meter and cut off the supply. An action on such account resulted in a judgment for plaintiff herein. Thereupon plaintiff requested that the meter be reinstated and the company again furnish him with gas. It refused to do so unless he would deposit \$10 as security for the payment of gas or procure some one to sign his contract with the company guaranteeing such payment. He declined to do either, and instituted this suit to compel defendant to re-establish its gas service and furnish him gas on equal terms and under like conditions with others.

On the trial the facts, as recited, were established, and also that, though the company had no formal rule on the subject, it had been customary when an applicant was unknown or was deemed not to be responsible to require a deposit or the contract to be signed by some responsible party, and several hundred of its patrons had complied therewith. The manager testified that such custom was reasonable and obtained elsewhere, and that he had reason to believe that plaintiff was not responsible, and that he was slow in his accounts, but, on cross-examination, admitted that his real reason for believing plaintiff not responsible was because of the suit mentioned, and that he knew of him failing to avail himself of the discount by paying for each month's gas within fifteen days after due but once, and that was owing to the company applying the amount of the bill on fixtures. No similar demand ever had been made on him before, and the record is convincing that in requiring the deposit or security as a condition to installing the meter the company was actuated solely by petty

spite because of its defeat in the suit on account in the justice court, and did not do so in the enforcement of one of its rules.

Corporations or persons who undertake to supply a demand which is "affected with a public interest" are not a law unto themselves, but are required to supply all alike who are alike situated, and are not permitted to discriminate in favor of or against any. By accepting from the city a franchise to lay pipes and mains in the streets and alleys and through them furnish the inhabitants and the public with fuel, illuminating, and power gas, the company assumed a public duty. That duty was to supply gas at reasonable rates to all the inhabitants of the city, and to charge each the same price and furnish on the same terms as it did to every other for like service under the same or similar conditions. *Haugen v. Albina Light & Water Co.*, 21 Or. 411 (28 Pac. 244, 14 L. R. A. 424); *Williams v. Mutual Gas Co.*, 52 Mich. 499 (18 N. W. 236, 50 Am. Rep. 266); *Shepard v. Milwaukee Gaslight Co.*, 6 Wis. 539 (70 Am. Dec. 479); *Owensboro Gas Co. v. Hildebrand* (Ky.) 42 S. W. 351; *American Waterworks Co. v. State*, 46 Neb. 194 (64 N. W. 711, 30 L. R. A. 447, 50 Am. St. Rep. 610). See *Huffman v. Telephone Co.*, 143 Iowa, 590. Such a company may adopt reasonable rules or regulations for the management of its affairs. *Cedar Rapids Gaslight Co. v. City of Cedar Rapids*, 144 Iowa, 426. The evidence discloses that it had been the custom to exact a money deposit or the signature of a person known to be responsible whenever the applicant was unknown or known to be irresponsible. The delivery of gas necessarily is its consumption. The amount can only be ascertained as consumed. The company is bound to furnish on application, and it is but just that it be not compelled to supply unknown or irresponsible persons therewith without assurance in some form that it will receive compensation. The adoption of a formal rule exacting security seems unnecessary if there is a well-

established custom as appears in this case to exact security as stated. The evidence discloses that this had always been customary with the company. In such a case, the custom has the force of a rule or regulation. Of course, it could not impose different terms according to whim or caprice, but must treat all consumers in like situations alike. As said in the *Cedar Rapids Gaslight* case, the company may not base a rule on the theory that the people as a whole are dishonest, but it has the right to adopt a rule which, while giving the honest citizen what he pays for, will prevent the dishonest from getting that which he will never pay for. Appellee argues that the custom in any event is unreasonable and unjust, in that no definite test is fixed for determining from whom security shall be exacted, all being left to the company's agents. It is unnecessary to pass on this point, for, conceding the validity of the regulation, we agree with the trial court that it was not resorted to in good faith. Prior to the suit in the justice court, no question had been raised concerning the plaintiff's responsibility. He had paid his bills promptly. Immediately thereafter the company's manager instructed the employees not to reinstate Phelan's meter without security, and on the trial he admitted having no other reason for declaring him slow in his accounts or irresponsible than the lawsuit in which the court adjudicated that the company's account had been paid. In retaliation, rather than because of questioning plaintiff's responsibility, the company demanded the security. In the absence of any evidence to the contrary, he is presumed to have been responsible for obligations undertaken, and the district court rightly directed the issuance of the writ of mandamus as prayed. *Affirmed.*

**A. L. STEIN, Appellant, v. MAUDE McAULEY and W. S.
McAULEY, Appellees.**

Appeal: OBJECTION TO JURISDICTION: HOW MADE. An objection to
1 the jurisdiction of the court to entertain an appeal, which is not
made in printed form and served upon the appellant as provided
by statute, will not be considered.

**Chattel mortgages: FORECLOSURE: ATTACHMENT: WAIVER OF MORTGAGE
2 LIEN.** Under the law of this State a chattel mortgagor retains
the legal title to the property, and his equity of redemption is
the subject of levy and sale: So that a mortgagee does not
waive his right to foreclose the mortgage by levying an attachment
upon the property.

Same. The above rule is especially applicable where the attachment
3 suit was dismissed before trial, as in this case.

Same: ELECTION OF REMEDIES: ESTOPPEL. By suing out an attachment
4 on chattel mortgage property the mortgagee does not elect
his remedy so as to deprive him of subsequently foreclosing the
mortgage, since the two proceedings are not inconsistent. And
the fact that the mortgagor incurred expenses in resisting the
attachment will not estop a foreclosure of the mortgage, especially
where, as in this case, there were other attachment suits
against the property instituted prior to the commencement of
the mortgagee's suit.

*Appeal from Polk District Court.—Hon. W. H. McHENRY,
Judge.*

TUESDAY, MARCH 15, 1910.

SUIT in equity for the foreclosure of a chattel mortgage upon certain household goods. Defendants pleaded a waiver of the mortgage and an estoppel, based upon an attachment of the goods by the plaintiff in a civil suit against them. Plaintiff by motion challenged these defenses, but

his motion was overruled. The case was then tried to the court, resulting in a decree dismissing the petition. Plaintiff appeals. *Reversed and remanded.*

F. F. Keithley and John Newburn, for appellant.

Bailey & Stipp and O. M. Slaymaker, for appellees.

DEEMER, C. J.—I. Our attention upon oral argument was called to the fact that the record showed no jurisdiction in this court, for the reason that there is no showing

1. **APPEAL:** that any decree had ever been entered in
objection to jurisdiction: the case. This point is not raised in any of
how made: the printed matter filed in the case. There is nothing in appellee's contention, for the reason that the record shows all the orders and the judgment complained of. Moreover, it is provided by statute that: "All objections to the jurisdiction of the court to entertain an appeal must be made in printed form stating specifically the ground thereof and served upon the appellant or his attorney of record not less than ten days before the date assigned for the submission of the cause." Chapter 206, Acts 33d General Assembly. This statute not having been followed, the point could not be considered, even were there anything in it as disclosed by the abstract.

II. There are two main questions in the case, and these are: First, did plaintiff waive his right to foreclose the chattel mortgage by reason of his levy upon the goods

2. **CHATTTEL MORTGAGES:** covered by the mortgage; and second, is
foreclosure: he estopped from foreclosing the mortgage
attachment: because he caused defendant to go to expense
waiver of mortgage lien. in defending against the attachment? The facts are that, before commencing this action to foreclose the chattel mortgage, plaintiff brought suit against the defendants and others to recover judgment upon the note secured by the mortgage, and in that action caused a writ of attach-

ment to be issued, which was levied upon all the mortgaged property, as well as some other goods not covered by the mortgage. Defendants were just starting to move to another town, and by reason of the attachment they were delayed somewhat, had to secure a delivery bond for the release of the property, and to employ lawyers to defend against the attachment. The original attachment suit, which was before a justice, was continued once or twice, and finally dismissed by plaintiff on the theory, as is now asserted, that the goods were exempt from attachment. This dismissal was entered without prejudice on the 15th day of February, 1909, and this suit to foreclose was brought on the 18th day of the same month. On these facts the trial court rendered judgment for the amount of the note in suit less payments, but denied the right of foreclosure, upon the theory that plaintiff had waived his mortgage, and was estopped from relying thereon.

The courts of the country do not seem to be agreed upon the first question presented for our determination, but the disagreement is more apparent than real. Upon the broad proposition it seems that the courts of Massachusetts, Maine, New Hampshire, Minnesota, Arkansas, and Oklahoma are committed to the doctrine that an attachment of the mortgaged property waives the lien of the mortgage. See *Evans v. Warren*, 122 Mass. 303; *Whitney v. Farrar*, 51 Me. 418; *Haynes v. Sanborn*, 45 N. H. 429; *Dyckman v. Sevatson*, 39 Minn. 132 (39 N. W. 73); *Cox v. Harris*, 64 Ark. 213 (41 S. W. 426, 62 Am. St. Rep. 187); *Dix v. Smith*, 9 Okl. 124 (60 Pac. 303, 50 L. R. A. 714). On the other side are the following: *Madson v. Rutten*, 16 N. D. 281 (113 N. W. 872, 13 L. R. A. (N. S.) 554); *Byram v. Stout*, 127 Ind. 195 (26 N. E. 687); *Barchard v. Kohn*, 157 Ill. 579 (41 N. E. 902, 29 L. R. A. 803); *Howard v. Parks*, 1 Tex. Civ. App. 603 (21 S. W. 269); *State Bank v. Mottin*, 47 Kan. 455 (28 Pac. 200, 27 Am. St. Rep. 306); *First Bank v. Johnson*, 68

Neb. 641 (94 N. W. 837); *Thurber v. Jewett*, 3 Mich. 295. In so far as we have been able to discover, this question has never heretofore been decided by this court, so that we are free to adopt that rule which seems to be best supported by authorities and sound reason. The whole doctrine of waiver is based upon the theory that the respective liens are essentially different, and cannot coexist. See *Evans v. Warran*, *supra*. When, then, a chattel mortgage conveys the legal title to the mortgagee, as in Massachusetts and some of the other states, affirming the doctrine of waiver, it is manifest that the conclusion reached in these jurisdictions is correct; for it is elementary, of course, that one may not attach his own property. But where the mortgage creates a mere lien upon the property, as in this state (see Code, section 2911), the reason for the rule does not exist and in such cases the rule itself is inapplicable. This distinction is pointed out in the cases from Illinois, Indiana, and Nebraska heretofore cited. In this state the mortgagor has an equity of redemption under a chattel mortgage, which may be levied upon and sold (see Code sections 3905, 3979); and, if this may be done, we see no reason why a mortgagee of the property may not himself levy upon this equity in the property itself without waiving his mortgage lien. In such a case he is not asserting title in himself in one proceeding and levying upon it in another. His rights, then, are simply cumulative, and in no sense inconsistent. This distinction is now generally recognized by courts and text-writers. See Jones on Mortgages (5th Ed.) section 565; 7 Cyc. 551; *Byram v. Stout*, *supra*; *Barchard v. Kohn*, *supra*; *First Bank v. Johnson*, *supra*. Moreover, it is quite generally held that, if the attachment suit does not go to judgment, there is no waiver. See *Thurber v. Jewett*, *supra*; *Ellinwood v. Holt*, 60 N. H. 57; *Dyer v. Cady*, 20 Conn. 563; *Conway v. Wilson*, 44 N. J. Eq. 457 (11 Atl. 734); *Madson v. Rutten*, *supra*. Even in

those states which adhere to the doctrine of waiver it is generally held that, if the title be in the mortgagor, and there be an equity of redemption subject to levy, there is no inconsistency in the two liens, and that an attachment of the property does not amount to a waiver of the mortgage lien. See *Whitmore v. Tatum*, 54 Ark. 457 (16 S. W. 198, 26 Am. St. Rep. 56), and, as supporting the same view, *Cochrane v. Rich*, 142 Mass. 15 (6 N. E. 781); *Clark v. Ward*, 12 Grat. (Va.) 440. It may be said in this connection that, while we have not heretofore decided this question, we have absolutely refused to follow the doctrine announced in the Oklahoma case of *Dix v. Smith, supra*. See *Webster City Grocery Co. v. Losey*, 108 Iowa, 687. This whole matter is so thoroughly covered by the cases cited in a valuable note to *Dix v. Smith supra*, 50 L. R. A. 714, that nothing further need be added.

III. We do not think there was a waiver of the mortgage lien, especially in view of the fact that the attachment was dismissed and never went to trial. Had

^{3. SAME.} there been a sale of the property under execution growing out of the attachment proceedings, we would have a very different proposition. Appellees contend, however, that in analogous cases we have recognized a different rule; but a careful study of these will disclose that this is not correct. Of course, if a lien depends upon possession and continued possession is essential to the lien, the party holding such lien can not surrender the possession through an attachment, and then assert his lien. This is all that is held in *Citizens' Bank v. Dows*, 68 Iowa, 460; *Lawrence v. McKenzie*, 88 Iowa, 432, and other like cases relied upon by appellee. See, in this connection, *Valley Bank v. Jackaway*, 80 Iowa, 512. Again, if one claims the legal title to property, his attachment thereof, being inconsistent with the claim of absolute ownership, constitutes a waiver. This is the rule of *Crawford v. Nolan*, 70 Iowa, 97. This

puts us in harmony with the rule in Massachusetts. And this is the rule of *Tone v. Shankland*, 110 Iowa, 525. It is sometimes put on the ground of waiver, and sometimes upon the principle of election of remedies; but in neither case does the rule apply unless the remedies actually exist and are inconsistent. *Moon v. Hartsuck*, 137 Iowa, 236, and cases cited. A case not cited by either of the parties gives support to the doctrine already announced. It is *Patterson v. Linder*, 14 Iowa, 414. In that case it was held that a sale of real estate on execution from a judgment for the purchase price does not extinguish, discharge, or waive a vendor's lien. See, also, *Blotcky v. O'Neill*, 83 Iowa, 574; *Pitkin v. Fletcher*, 47 Iowa, 53; *Rollins v. Proctor*, 56 Iowa, 326; *Gilcrest v. Gottschalk*, 39 Iowa, 311; *Hawley v. Warde*, 4 G. Greene, 36; *Atlantic Co. v. Carbondale Co.*, 99 Iowa, 234. Our conclusion is that, in so far as our cases bear upon the subject, they are in accord with the rules announced.

IV. As already suggested, there was no election of remedies in the case, for the reason that the proceedings were not inconsistent, and for the further reason that no such election was pleaded.

V. The claim of estoppel has no support in the testimony, for the reason that plaintiff is not taking inconsistent positions, and for the further reason that the expenses incurred by defendants in the attachment suit do

not constitute a basis for an estoppel. *Bull v. Keenan*, 100 Iowa, 144, *Dorris v. Miller*, 105 Iowa, 564. If plaintiff sued out the attachment wrongfully, doubtless defendants would have their remedy, but the mere fact that they made defense to that suit, and were successful in securing a nonsuit, even at some expense to themselves, will not serve as the basis for an estoppel. *Warder v. Baker*, 54 Wis. 49, (11 N. W. 342); *Wallis v. Truesdell*, 6 Pick. (Mass.) 455; *Henderson v. McMahill*, 75 Iowa, 217; *Brown v. Holden* 120

4. SAME:
election of
remedies:
estoppel.

Iowa, 191. Again it appears from the record that two other attachment suits were commenced against defendants, and levies made upon the property, before plaintiff commenced his attachment suit, and that he procured delivery bonds and was delayed in the shipment of goods, and that his expenses were incurred as much for one attachment suit as the other. Surely under such a state of facts there was no estoppel.

The trial court was in error in denying the decree of foreclosure under the testimony and the issues joined, and the case must be reversed and remanded for a decree in harmony with this opinion.

Reversed and remanded.

THE STATE OF IOWA, Appellee, v. GEORGE HERRINGTON,
Appellant.

Criminal law: RAPE: AGE OF CONSENT: EVIDENCE: INSTRUCTIONS. An instruction on a prosecution for rape committed on a child under the age of consent to the effect that her previous character was immaterial, since the statute prohibits intercourse under any circumstances with a child under fifteen years of age, but that evidence of her previous conduct should be considered as bearing on her credibility, was not objectionable as assuming that she was under the age of consent; where among the material allegations required to be proven by the state beyond a reasonable doubt, as set forth in other instructions, was the allegation as to her age.

Same: CORROBORATING EVIDENCE: INSTRUCTIONS. The instructions in the instant case are held to fully state the rule that a conviction of rape can not be had on the testimony of the injured party alone, but that there must be other credible evidence independent of and corroborating that of prosecutrix, and tending to connect the defendant with the commission of the crime.

Same: EVIDENCE. Evidence reviewed and held sufficient to sustain conviction for rape.

Same: INCLUDED OFFENSE: INSTRUCTION. Where a defendant is

4 either guilty of the offense as charged or is not guilty at all there is no included lesser offense for submission to the jury. As where defendant was charged with rape upon a child under the age of consent, and the evidence was conclusive that the crime was voluntary on the part of the prosecutrix, assault and battery was not an included offense.

Appeal from Woodbury District Court.—HON. FRANK R. GAYNOR, Judge.

TUESDAY, JUNE 14, 1910.

INDICTMENT for rape upon a female child under fifteen years of age. Verdict of guilty and judgment thereon. Defendant appeals.—*Affirmed.*

Sullivan & Griffin and C. W. Piersol, for appellant.

H. W. Byers, Attorney-General, and Charles W. Lyon, Assistant Attorney-General, for the State.

EVANS, J.—The offense charged is alleged to have been committed in Sioux City on February 23, 1910. The prosecutrix was thirteen years of age and the defendant was thirty-three years of age. They met for the first time upon the streets of Sioux City on the evening of that day, and within a few minutes after such meeting they went to the private lodgings of the defendant, where the prosecutrix stayed all night. Up to this point the facts are undisputed. Under the testimony of the prosecutrix the crime was committed at such time and place. Under the testimony of the defendant, he admits meeting the prosecutrix as a stranger and taking her to his lodgings, and that she occupied the same, but he claims that he left her there, and sought other lodgings for himself.

I. The defendant complains of the eighth instruction given by the court to the jury on the alleged ground that it

assumed as an established fact that the prosecutrix was under fifteen years of age. Many authorities are cited to the effect that, notwithstanding ^{1. CRIMINAL LAW: rape; age of consent; evidence; instructions.} that the testimony upon this question was undisputed, it was nevertheless in issue, and was to be determined by the jury. The State has no occasion to controvert the legal proposition contended for. Defendant's argument at this point places a construction upon instruction eight, which is not warranted. This instruction is as follows:

Par. 8. You will notice from the foregoing statute that it is immaterial as to what the previous character of the female was or what her prior conduct has been, for, as you observe, the law absolutely prohibits the having of sexual intercourse with a female under the age of fifteen years; but you are to consider all the testimony that has been offered and introduced before you touching her previous character and conduct as bearing upon the credibility of her testimony and the reasonableness of the story which she tells, and give it such weight and credit as you believe it is fairly and reasonably entitled to under all the facts and circumstances and evidence submitted to you.

In a previous instruction, the court had recited the provisions of the statute as applied to the offense charged in the indictment. In instructions 2 and 3 the court set forth the material allegations of the indictment, and charged the jury that the burden was upon the state to prove every one beyond a reasonable doubt. One of such material allegations specifically recited by the court was "that the said Florence Ward was then and there a female child under the age of fifteen years." This charge was emphasized by repetition in instruction 7. Instruction 8 was properly explanatory of the statute, and was in no sense inconsistent with the previous instructions here referred to.

II. The defendant complains of the alleged failure

of the court to instruct the jury "fully as to what constituted corroborating evidence, and that such corroborating evidence must be evidence other than that coming from the prosecutrix." An examination of the record quite refutes defendant's criticism at this point. The ninth instruction given by the court is as follows: "You are instructed that under the law a person can not be convicted of rape or assault with intent to commit rape upon the testimony of the party injured alone. There must be other testimony to justify a conviction which corroborates and sustains her in her testimony, insofar as by her testimony she seeks to connect the defendant with the commission of the crime; that is, you can not convict upon the testimony of the party injured, Florence Ward, in this case, unless you find other evidence which corroborates and sustains her and tends to connect the defendant with the commission of the crime charged." This requirement of the statute was further emphasized in the eleventh instruction as follows: "That is, the law requires that she be corroborated by some other unimpeachable evidence in the case tending to connect the defendant with the commision of the crime, but mere opportunity on the part of the defendant to commit the crime is not such corroboration as the law requires." These instructions leave the defendant no ground of complaint in this respect.

It is also argued that there was no sufficient corroborating evidence. This point is without merit. The corroborating evidence in the case is unusually prominent. As

3. ~~SAME:~~ suming that it was competent for the jury to ~~evidence.~~ find upon the testimony of the prosecutrix alone that the crime was committed by some one, the defendant's own testimony was abundant corroboration tending to connect him with the offense. In addition to that, was the testimony of his landlady who discovered the presence of the prosecutrix, and forbade the defendant

from keeping her. There was considerable other testimony of greater or less weight, all of which confirmed the testimony already referred to. The defendant was a witness in his own behalf, and his own testimony was such as to leave no doubt of his guilt in the light of the other testimony in the case. We have read the evidence with care. It is sufficient to establish the guilt of the defendant, not only beyond a reasonable doubt, but quite beyond the possibility of doubt. It is argued that the prosecutrix, notwithstanding her tender years, was an abandoned character. Unfortunately such appears from this record to be only too true. But the defendant's own character stands in no better light.

III. The court in its instructions submitted to the consideration of the jury the crime of assault with intent to commit rape as the only included lesser offense. It is

alleged by the defendant that the crime of
4. SAME:
included
offense:
instruction. assault and battery was an included lesser offense, and that the court should have so instructed the jury. Under the evidence in this case, the crime was voluntary on the part of the prosecutrix. There was no evidence tending to the contrary in any degree. There was therefore no basis in the evidence for any finding of assault and battery. The defendant was therefore guilty of the graver offense or he was not guilty at all. This has been our uniform holding heretofore in this class of cases. *State v. Stevens*, 133 Iowa, 684; *State v. King*, 117 Iowa, 492; *State v. Sherman*, 106 Iowa, 684. No other errors are presented for our consideration.

The judgment below must therefore be *affirmed*.

W. B. SMITH, Appellant, v. THE SANBORN STATE BANK,
Appellee.

Breach of contract: DAMAGES: MENTAL ANGUISH. Damages for mental anguish growing out of a breach of contract to pay money are not recoverable, but generally the damage in such cases is

confined to the sum wrongfully withheld, with interest. The cases in which a recovery may be had for mental anguish because of the breach of a contract are those in which an action for the breach, if the plaintiff so elects, may be brought, sounding in tort.

Banks and banking: SPECIAL DEPOSIT: APPLICATION TO DEBT DUE THE BANK. A bank to which a depositor is owing a matured indebtedness may appropriate a general deposit of the debtor to a discharge of the debt; but it has no such right where a deposit is made for a special purpose or under a special agreement.

Appeal from O'Brien District Court.—HON. WILLIAM HUTCHINSON, Judge.

TUESDAY, JUNE 14, 1910.

ACTION at law to recover damages for breach of contract. Verdict directed in favor of defendant. Judgment accordingly, and plaintiff appeals. *Reversed.*

C. A. Babcock, for appellant.

No appearance for appellee.

WEAVER, J.—Stated as briefly as practicable, the plaintiff's petition alleges that in October, 1908, he became the owner of a certain check or bill of exchange payable to himself for the sum of \$200, and took the paper to the plaintiff bank, and sought to obtain the money thereon. In so doing he expressly informed the officer in charge that he desired to use the money in paying a rent claim of \$40 held by said bank for collection and the remainder in defraying the expenses of immediate medical and surgical treatment of his wife, whom he expected to remove to a hospital in the city of St. Paul, in the state of Minnesota, on the following day, and that the money represented by said check was necessary to enable him to do so. Thereupon said bank officer told plaintiff that the safe in which the

funds of the bank were kept had been locked for the night, but that plaintiff could leave the draft as a deposit, together with a check for \$43, to cover both the rent claimed and an item of \$3 which he was owing the bank, and the remainder could be drawn by him, as the money might be needed in the treatment of his sick wife. On the following day, having given checks to others to an amount which reduced the deposit to \$101.50, he called at the bank to obtain the same for the purpose of taking his wife to the hospital, but defendant refused to pay it over, informing him that it had applied the deposit upon a promissory note which it held against him. Upon this showing plaintiff asks to recover judgment for the sum of money so withheld, with interest. In a second count of the petition the same facts are set forth, and it is further alleged that the money represented by said check constituted the only means he had with which to secure the necessary treatment of his sick wife, and that, being poor and without property on which to secure a loan, he was delayed several days in obtaining the necessary assistance to aid him in carrying out his purpose to take his wife to the hospital, and that as a result thereof he was put to great labor and trouble and made to suffer great humiliation, anxiety and distress of mind, for which he asks damages in the sum of \$500. The defendant admits the receipt of the check for \$200, alleges that it paid therefrom on plaintiff's checks the sum of \$98.50, and that it applied and now asserts the right to retain the remainder in payment of a promissory note which it then held against the plaintiff. The evidence fairly tends to sustain the allegations of the petition.

At the close of plaintiff's case defendant moved for a directed verdict in its favor on the grounds: (1) That it is shown without controversy that plaintiff's deposit being an open account subject to check, the bank had the legal right and authority to apply it in payment of plain-

tiff's note. (2) That the law allows no recovery of damages for mental suffering occasioned by breach of contract, and that the damages which plaintiff seeks to recover are too remote, indirect and speculative to sustain a verdict in his favor on the second count of the petition. This motion was sustained by the court, verdict returned as ordered, and judgment for costs entered against plaintiff, who appeals.

Actuated perhaps by the same spirit of saving which led it to violate its agreement with plaintiff to receive and hold the money for his use in the treatment of his sick wife, the appellee has employed no counsel to represent it in this court, and we are therefore deprived of the benefit of a brief in support of the judgment which it obtained below, and there is nothing in the record to equitably incline this court to seek for reasons to sustain it. We may assume perhaps that the appellee's view of the law governing the cause, as well as the view of the trial court thereon, is epitomized in the grounds of the motion for a directed verdict to which we have already called attention.

Referring first to the second proposition of the motion, we are obliged to hold that the damages for which recovery is demanded in the second count of the petition

i. BREACH OF
CONTRACT:
damages:
mental
anguish.

are too remote, and that the trial court correctly held that no case for the jury had been made on this branch of the case. That such damages have been held recoverable

in certain cases growing out of contract rights and relations must be admitted, but these are to be found almost entirely in that class of contracts upon breach of which the injured party may, if he so elect, bring an action sounding in tort. Familiar examples of this nature are found in cases upholding the recovery of such damages for negligence in the transmission and delivery of telegrams. *Mentzer v. Telegraph Co.*, 93 Iowa, 752; *Cowan v. Telegraph Co.*, 122 Iowa, 379. Of the same character

are certain cases against common carriers. *Brown v. Railroad Co.*, 54 Wis. 342, (11 N. W. 356, 911, 41 Am. Rep., 41); *Sloane v. Railroad Co.* 111 Cal. 668, (44 Pac. 320, 32 L. R. A. 193). But no case has been called to our attention, nor do we think one can be found, which holds that damages are recoverable for mental anguish growing out of the violation of a contract for the payment of money. To so hold would be to open the door to a ruinous flood of litigation. Occasions will arise when it would seem that such a recovery is demanded in the interests of justice, but it is better that the exceptional wrong should sometimes go unrequited than to abrogate a rule which in the vast majority of cases has a salutary effect. Generally speaking, failure to pay or deliver money according to agreement gives rise to no recoverable damages beyond the sum wrongfully withheld with interest during the time payment is delayed. Special circumstances may sometimes justify the recovery of special damages, but these do not include compensation for mental suffering.

As to the first ground of the motion for the directed verdict which is in substance that under the undisputed facts of the case the defendant bank had the right to apply

2. **BANKS AND BANKING: special deposit: application to debt due the bank.** the deposit to the payment of the note, we are of the opinion that it can not be sustained, and that the trial court erred in directing a verdict against plaintiff thereon.

Of the general rule that a bank to whom a depositor is owing a matured indebtedness may appropriate the general deposit of its debtor to the discharge of the obligation there can be no doubt. *Aetna Bank v. Fourth Nat. Bank*, 46 N. Y. 82, (7 Am. Rep. 314); *Knapp v. Cowell*, 77 Iowa, 528. But it is no less certain that a deposit made for a special purpose or under a special agreement can not rightfully be so appropriated. *Wilson v. Dawson*, 52 Ind. 513; *Strauss v. Bank*, 36 Hun (N. Y.) 451; *Strauss v. Bank*, 122 N. Y. 379, (25 N. E. 372); *Judy v. Bank*, 81 Mo.

404; *Bank v. Macalester*, 9 Pa. 475; *Bank v. Bangs*, 84 Ky. 135 (4 Am. St. Rep. 197). Indeed, the proposition that a bank enjoys no exemption from the general rule by which every party to a business transaction or agreement is legally bound to respect the obligation of his contract is one which ought to require neither argument nor citation of authority. The evidence shows without dispute that the check for \$200 was placed with the defendant upon the express agreement and understanding that, after paying certain specifically named debts, the remainder would be repaid to the plaintiff on the following day, or whenever called for to enable him to take his wife to the hospital for needed treatment. Upon money so received, no lien attached in favor of the bank, and its attempt to appropriate the same was wholly without right or authority. Upon such a record plaintiff was clearly entitled to recover.

It follows that the direction of a verdict in defendant's favor upon the first count of the petition can not be sustained, and the judgment of the trial court is therefore *reversed*.

THE STATE OF IOWA v. FRANK DUDLEY, Appellant.

Criminal law: CONTINUANCE. Where it appears from the record that 1 the time allowed defendant in which to prepare for trial was adequate for the full presentation of his defense, the court's discretion in refusing a continuance over the term for the purpose of preparing the case will not be disturbed on appeal.

Rape: EXAMINATION OF PROSECUTRIX: LEADING QUESTIONS. Reticence 2 of a prosecutrix for rape in testifying to the details of the offense furnishes sufficient ground for permission to ask her leading questions.

Evidence: COMPLAINT OF PROSECUTRIX. Where it was apparent from 3 the examination of prosecutrix that her statements concerning the offense had reference to defendant's intercourse with her, and none of the details were called for, evidence of such statements was not objectionable because not limited to a complaint.

Nor did the mere fact that it was subsequently made to appear that her statements were made in response to questions, rather than otherwise, require the court to exclude the same, in the absence of a motion to that effect.

Same: LAPSE OF TIME. The lapse of two months between the time 4 of an alleged rape and the complaint of prosecutrix will not render evidence of the complaint inadmissible.

Same. It is the natural impulse of a female upon whom rape has 5 been committed to make known her wrongs, and her voluntary statements concerning the offense are not deprived of their character as complaints simply by the fact that they were made in response to inquiries, but her statements so made are receivable in evidence in corroboration of her credibility. The evidence of complaint in the instant case is held admissible.

Same: PHYSICAL CONDITION OF PROSECUTRIX. Evidence of the physical condition of prosecutrix, although the result of an examination made some time after the alleged rape, is admissible.

Same: CORROBORATION. Evidence that another saw defendant in the 7 room with prosecutrix shortly after the offense, and that prosecutrix was sitting on the bed with her clothing and hair in a disordered condition, together with plaintiff's admission of his presence, was sufficient corroboration.

Same: UNCHASTITY. The possession by prosecutrix of an unsigned 8 and unaddressed letter, suggesting sexual intercourse at a time prior to the alleged offense, was inadmissible to show that she was unchaste.

Evidence: CORROBORATION. Refusal of the court to eliminate by an 9 instruction the admission of defendant that he was at the house of prosecutrix at the time of the alleged offense and had his boots off, on the ground that it was not corroboration but merely evidence of opportunity, was proper.

New trial IMPEACHMENT OF VERDICT: AFFIDAVITS OF JURORS. Affidavits of jurors to the effect that they considered evidence of prosecutrix' complaint as tending to identify defendant as the person who committed the rape, in the face of an express instruction of the court not to do so, were properly stricken, for the reason that jurors are not thus permitted to impeach their own verdict, even though they may have misunderstood the instruction.

Same: MISCONDUCT OF JUROR. The mere fact that one of the jurors 11 spoke to prosecutrix during the trial, simply passing the time of day, was not prejudicial to defendant.

Same: MISCONDUCT IN ARGUMENT. A defendant in a criminal action 12 may rely on the presumption of his good character, which always obtains in the absence of evidence to the contrary, and remain silent on the subject; and where this is done and defendant offers no evidence of his good character, it is improper for counsel in argument to state that the law gives him the right to show his good character and that they have a right to infer that he would have done so if he could; and where, as in this case, the court overruled an objection to the argument it became especially objectionable.

Same: AMENDMENT TO MOTION OR PETITION: JURISDICTION. After entry 13 of judgment and the taking of an appeal the trial court has no jurisdiction to hear either an amendment to a motion or a petition for new trial.

Appeal from Guthrie District Court.—Hon. EDMUND NICHOLS, Judge.

TUESDAY, JUNE 14, 1910.

THE defendant was convicted of having committed rape, and appeals. *Reversed and remanded.*

J. R. Mount and Weeks & Hughes, for appellant.

H. W. Byers, Attorney-General, Charles W. Lyon, Assistant Attorney-General, and Sayles & Taylor, for the State.

LADD, J.—I. An indictment accusing defendant with having had sexual intercourse on May 28, 1909, with prosecutrix, a child under fifteen years of age, was returned 1. **CRIMINAL LAW:** October 12, 1909. He was arraigned two continuance days later, and given until the 19th to file a motion for continuance. The grounds of this motion were that neither he nor his attorneys would have time to prepare for the defense so as to go to trial before the next term of court, and that defendant's private affairs required attention. The motion was overruled and the cause assigned for trial October 27, 1909. This allowed

only fifteen days during a term of court in which to prepare for trial. But defendant was represented by several attorneys of ability and long experience, and the record of the trial indicates that the time was adequate and the defense fully presented, and it can not be said that substantial justice would have been more nearly obtained had a continuance been granted. The record before us does not indicate an abuse of discretion in overruling the motion.

II. After relating that she was fifteen years of age July 28, 1909, that her mother had been dead eight years, that she was living with her father on a farm, that on the 28th of May, 1909, shortly after nine o'clock a. m., while her father was away, defendant called, and, after ascertaining that her father was not at home, removed his boots and came into the house, that he immediately threw her on the bed, unfastened his and her clothes, and got on top of her, prosecutrix was asked, "What then did he do?" No answer being given, the court remarked that leading questions "in reference to this matter at this time" would be permitted. Thereupon a leading question as to what then occurred was propounded, and, over objection answered. Reticence in testifying to matters of this kind by witnesses in the situation of prosecutrix furnishes a sufficient ground for an exception to the rule against leading interrogatories. *State v. Burns*, 119 Iowa, 663; *State v. Peterson*, 110 Iowa, 647; *State v. Waters*, 132 Iowa, 481. There was no error in the ruling.

Prosecutrix was asked whether she had told "about this to any one, and, if so, to whom," and, over objection, answered that she had informed one Bishop, a mail carrier, the next morning and a Mrs. Lilly on July 25th following. It is said the inquiry in form did not limit the answer to a complaint. By "this" manifestly was meant the act of intercourse, and,

3. EVIDENCE:
complaint of
prosecutrix.

as none of the details were called for, we think the criticism without foundation. Subsequently it developed that her statement to Bishop had been in response to questions and, as she said, was not voluntary. But this did not obviate the correctness of the ruling when made, and, in the absence of a motion to strike the answer, there was no error.

Nor can it be said that the length of time between the alleged offense and the statement to Mrs. Lilly was such as necessarily to require its exclusion. *State v.*

<sup>4. SAME: lapse
of time.</sup> *Bebb*, 125 Iowa, 494; *State v. Wheeler*, 116 Iowa, 212.

The circumstance related by Mrs. Lilly of having met prosecutrix seven or eight times after the transaction in question and her alleged complaint, and that she had already informed the detective, robbed such complaint of any probative value, and warranted the court in excluding Mrs. Lilly's evidence concerning same, but this did not obviate the correctness of the ruling on objection to prosecutrix's testimony, though, had defendant thereafter moved to strike her statement that she told Mrs. Lilly, the motion should have been sustained.

III. Bishop was asked what prosecutrix said had happened, and, over objection as immaterial, incompetent, irrelevant, and hearsay, answered: "I asked her if it was

^{5. SAME.} her I heard crying the day before, and she said it was. I asked her what was the matter, and she said, 'That dirty thing.' I wanted to know what she meant, and she said: 'That nasty Frank Dudley.' I asked her what he had done, and she said he had done all he could. I asked what she meant and she said he did what he wanted to, and she was crying and talking on all the time she was telling me; had her arms on the gate post and her head on her arms, crying." It will be observed that the question was proper and the objection rightly overruled, even though the answer were otherwise and

no exception was taken to it. But the circumstance that her statements were in response to questions did not necessarily rob them of their character as complaints. *State v. Peres*, 27 Mont. 358, (71 Pac. 162); *Rex v. Osborne*, 74 L. J. K. B. 311. When an outrage is committed on a female, the instincts of her nature prompt her to make known her wrongs, and to seek sympathy and assistance. It is the natural expression of her feelings, and is received in evidence as tending to corroborate her credibility. *State v. Wheeler*, 116 Iowa, 212. Of course answers to questions involuntary in character are not to be regarded as complaints, but as mere recitals of what is claimed to have happened. *State v. Rebb*, 125 Iowa, 494; *State v. Pollard*, 174 Mo. 607, (74 S. W. 969); *Cunningham v. People*, 210 Ill. 410 (71 N. E. 389). But the prosecutrix was laboring under no compulsion, and her manner as disclosed by Bishop's testimony was such as to indicate that she was giving free expression to the indignity and wrong which had been done her. The court rightly received the evidence; the circumstances being for the jury's consideration in determining what weight should be given it.

IV. A physician testified to having examined prosecutrix two and one-half months after the alleged rape, and having found the hymen destroyed. The evidence

^{6. SAME: physical condition of prosecutrix.} was admissible. *State v. King*, 117 Iowa, 484; *State v. Teipner*, 36 Minn. 535, (32 N. W. 678); *Commonwealth v. Allen*, 135

Pa. 483, (19 Atl. 957). The length of time intervening may have impaired somewhat the probative value of the evidence, but did not require its exclusion. In the last-mentioned case evidence of an examination occurring a year and a half after the alleged commission of the offense was held to have been rightly received. Practically the only value of proof of condition so long afterwards is to show that the parts were not such as to disprove the charge.

V. At the conclusion of the state's evidence, defend-

ant moved that the jury be directed to acquit on the ground that there was no corroborating evidence tending to connect

7. ~~SAME:~~ ^{corroboration.} him with the commission of the offense.

The father of prosecutrix testified that, upon returning between nine and ten o'clock of the morning in question, he stepped to the door of his house to tell his daughter to hand him tobacco, when he observed defendant sitting therein looking at a picture and the daughter sitting on the edge of a bed with clothes "ruffled up," and her hair down over her face and eyes. Surely this evidence, if believed, tended to single defendant out as the perpetrator of the offense and the credibility of the witness, even though convicted of a felony, was for the jury. We are the more inclined to this view because of defendant's admission that he was in the house at the time without his boots, having left them at the door upon entering.

VI. Defendant offered to show that prosecutrix had in her possession in the spring of 1908, prior to the alleged rape, a note saying the writer would meet her "to-night"

8. ~~SAME:~~ ^{unchastity.} and have intercourse with her. On objec-

tion, the evidence was excluded as immaterial and incompetent. That the mere possession of such a paper addressed to no one and unsigned did not tend to show that she had indulged in sexual intercourse is too evident for discussion. Possibly it might tend to prove an unchaste mind, but no inference of the commission of the act could properly have been inferred therefrom. For this reason *State v. Bebb*, 125 Iowa, 494, and *State v. Height*, 117 Iowa, 650, are not in point.

VII. Complaint is made of the court's refusal of an instruction to the effect that the testimony of prosecutrix's father was the only evidence other than hers

9. ~~EVIDENCE:~~ ^{corroboration.} tending to connect defendant with the commission of the offense. This was not error.

The circumstance that defendant admitted that he was in the house with his boots off might well have been considered

in connection with the testimony of her father. It was indicative of undue familiarity.

VIII. The court instructed the jury that: "Some evidence has been offered on the trial that subsequently to the day of the alleged rape that the prosecuting witness,

Retta Coons, made complaint to one Bishop; and there is also some testimony with reference to the condition of the hymen at an examination made some time after the alleged rape. This testimony is admitted and may be considered by you as corroborative simply of the statements of the prosecuting witness with reference to the crime of rape having been committed upon her. The complaint, if any, and the evidence as to the genital organs having been injured, is not to be considered by you as tending to point out the person who committed the offense." The contention that no such complaint had been made has been disposed of. The instruction is set out in order to show how pointedly the jury were told not to consider the evidence of complaint as tendering to point out the person who committed the offense. And yet in the face of this instruction eleven of the jurors made affidavits that they had considered Bishop's testimony as tending to connect the defendant with the commission of the offense. This does not obviate the correctness of the instruction which clearly advised to the contrary. These affidavits were stricken from the files, and rightly so. Jurors can not be permitted to thus stultify themselves, and thereby impeach their own solemn findings. That the jury misunderstood the instructions if correct furnishes no ground for new trial. In *Brown Land Co. v. Lehman*, 134 Iowa, 712, evidence had been erroneously admitted, a motion to strike overruled, and it had been commented on by counsel in their argument to the jury, and, although the court had withdrawn the issues upon which the evidence was received, the affidavits of the jurors were admitted as showing that

10. NEW TRIAL:
impeachment
of verdict:
affidavits
of jurors.

they had considered the evidence in reaching the verdict. The evidence was still before the jury, though improperly and it was thought the case was analogous with one where improper matters had been brought to the attention of the jurors, as in *Douglass v. Agne*, 125 Iowa, 67. The distinction between such cases and those wherein the affidavit is of a matter inhering in the verdict is pointed out in the last case. Affidavits of jurors that they have been unduly influenced by their fellows, or of the reasons for assenting to the verdict, or of improper arguments resorted to in the jury room, or that they did not assent to the verdict, or that it was not the result of their deliberate judgment, or they did not understand the instructions of the court as these matters inhere in the verdict, are incompetent, and can not be received to impeach the jury's findings. *Cowles v. Railway*, 32 Iowa, 515; *Garretty v. Brazell*, 34 Iowa, 100; *Ward v. Thompson*, 48 Iowa, 588; *Fox v. Wunderlich*, 64 Iowa, 187; *Bryson v. Railway*, 89 Iowa, 677; *State v. Steidley*, 135 Iowa, 512; *State v. Dickson*, 6 Kan. 209. Directly in point are *Davenport v. Cummings*, 15 Iowa, 219, and *Christ v. Webster City*, 105 Iowa, 119. And the rule with reference to misunderstanding instructions prevails elsewhere. *Smith v. Eams*, 3 Scam. (Ill.) 76, (36 Am. Dec. 515); *Baker v. Sherman*, 71 Vt. 439, (46 Atl. 57); *Schultz v. Catlin*, 78 Wis. 611, (47 N. W. 946); *Richardson v. McLemore*, 64 Tenn. 586; *Inhabitants of Bridgewater v. Inhabitants of Plymouth*, 97 Mass. 382; *Handy v. Insurance Co.*, 1 R. I. 400. Jurors after having agreed to a verdict cannot, in order to have it set aside, explain by affidavit the ground or train of reasoning by which they arrived at the result. Should affidavits of this character be entertained, few verdicts would stand, as some jurors would be found in most cases who would allege as mistakes of law or fact what were really afterthoughts suggested by the defeated party or his counsel.

IX. One of the jurors spoke to prosecutrix during

the trial, but had no conversation with her further than passing the time of day. Though there
<sup>11. SAME:
misconduct
of juror.</sup> was no occasion for what the juror did as he had not known her save at the trial, the incident was without prejudice.

X. In the course of his closing argument to the jury, E. R. Sayles, who was assisting the county attorney, said:

I do not think I invade or overstep the bounds of propriety in arguing this case in suggesting to you this fact, that the law gives the defendant in a criminal case a right to show his good character especially
<sup>12. SAME:
misconduct
in argument.</sup> with reference to the particular quality of character which is involved in the charge made against him. For instance, in this case it would be proper for the defendant to show by the testimony of his friends and neighbors in the community in which he resides, prior to the commission of this offense, that he was a man of good moral character, and particularly to his treatment of women, especially with reference to his respect for the chastity and rights of women. And I ask you, gentlemen, if there is a syllable of evidence offered by the defendant in this case to show to you that this man ought not to be supposed to have committed this crime, ought not to be found guilty of it because he had hitherto, and prior to the commission of this offense, borne a reputation for good moral character in the community in which he resided. I say, gentlemen, he having the right and having learned counsel at his command and employed for his defense, if it would have been possible to have shown it, we have a right to infer that they would have done it.

To this statement of counsel defendant objected, as follows: "Defendant objects to the statement of counsel for the state that the jury would have a right to infer that if the defendant could have produced evidence of his good character that he would have done so in this case, as being improper and getting outside the record, and not properly a matter in reply to argument made by counsel for the

defendant." The objection was overruled. The evident purport of the argument was that, because of defendant's omission to prove his character good, the jury might infer it to have been bad. He had the right to rely on the presumption of good character which always obtains in the absence of evidence to the contrary, and remain silent, and the jury had no right to take into consideration his omission to call witnesses in support of his character, and weigh it against him in any manner to establish his guilt. *State v. Kabrich*, 39 Iowa, 277; *State v. Dockstader*, 42 Iowa, 436. In these decisions, instructions to the contrary were denounced as erroneous. The argument of counsel with the ruling of the court was quite as effective as an instruction, and the jury might well have inferred therefrom that such omission was proper matter for their consideration. Of what value is the privilege of every person accused of crime to put his character in issue or not as he shall choose if it can thus be frittered away by inference often more effectual than any adverse testimony which might be adduced? None, and so the courts with apparent unanimity have denounced argument of this kind as constituting prejudicial error. *People v. Evans*, 72 Mich. 367 (40 N. W. 473); *Fletcher v. State*, 49 Ind. 124 (19 Am. Rep. 673); *State v. Hull*, 18 R. I. 207, (26 Atl. 191, 20 L. R. A. 609); *State v. Upham*, 38 Me. 261; *Stephens v. State*, 20 Tex. App. 255; 1 Bish. Crim. Proc. sec. 1119; *Bennett v. State*, 86 Ga. 401, 12 S. E. 806, 12 L. R. A. 449, 22 Am. St. Rep. 465). The Attorney-General suggests that the portion of the address quoted was in response to such an argument by counsel for the defendant, but it does not purport to be, and the record which must be assumed to be complete does not so indicate. We are united in the opinion that what was said was beyond the pale of fair argument, and in connection with the court's ruling put that in issue which under the law could only

be injected in the case by defendant's election—his character prior to the alleged offense.

XI. After judgment had been entered and an appeal to this court perfected, an amendment to the motion for new trial was filed, and also a petition for new trial. On hearing both were overruled and rightly so, for the trial court was without authority to entertain either. *State v. Bixby*, 39 Iowa, 465; *State v. Hayden*, 131 Iowa, 1.

Because of error pointed out, the judgment is reversed and the cause remanded.

W. A. OLIPHANT, Administrator of the Estate of G. G. OLIPHANT, Deceased, Appellant, v. THE AMERICAN HEALTH AND ACCIDENT ASSOCIATION.

Benefit insurance: BENEFICIARIES: INDEPENDENT PROVISIONS: VALIDITY OF CERTIFICATE. Although a benefit certificate names a beneficiary prohibited by the statute, still the certificate will not be held wholly void where there is another beneficiary named therein, under independent provisions, who is not within the prohibited class. In this action the certificate provides that if the insured received certain injuries resulting in death the association would pay a certain sum to a specified church, a beneficiary prohibited by the statute; and in case of injuries causing disabilities not resulting in death the insured should be paid stated weekly benefits, and it is held that although the church was not a person to whom a benefit could be made payable the certificate was not wholly void, since the provision for benefits in case of accident not resulting in death was valid.

Same: RECOVERY OF BENEFITS. As the certificate was not wholly void and it provided that under certain conditions the association would pay the insured certain benefits, among which was a death benefit to be paid to a beneficiary named, if surviving, otherwise to be paid to the legal representative of the insured, and the designated beneficiary being within the prohibited class, there were no surviving beneficiaries within the meaning of the certificate, and the administrator of the insured was entitled to recover the benefit.

*Appeal from Union District Court.—Hon. H. K. Evans,
Judge.*

TUESDAY, JUNE 14, 1910.

ACTION to recover the death benefit provided for in a certificate of the defendant association. The court sustained a demurrer to the petition, and rendered judgment for defendant, from which plaintiff appeals. *Reversed.*

James G. Bull, for appellant.

P. C. Winter, L. J. Camp, and J. B. Sullivan, for appellee.

McCLAIN, J.—The defendant is a stipulated premium accident insurance association, which provides in its certificates for the payment by members of quarterly assessments of fixed amounts, and agrees that out of the benefit fund thus created it will pay stipulated sums on account of accidental death and weekly benefits for certain specified accidental injuries not resulting in death. In May, 1908, on the application of G. G. Oliphant, it issued to him a certificate or socalled policy, the first three paragraphs of which were as follows:

In consideration of the representations, agreements, and warranties contained in the application for this insurance, the payment of the certificate and membership fees of two dollars, and the further payment of three dollars quarterly in advance as agreed upon in application, the association does hereby accept Grant G. Oliphant of Des Moines, Iowa, for one year or more, hereinafter called the assured, under classification A, an insurance solicitor by occupation, and subject to all provisions and conditions herein contained or indorsed hereon, will pay the assured the following benefits during the time this contract is maintained in continuance, force and effect, viz.:

First. Should the assured receive external visible bodily injury while this certificate is in full force solely through external, violent, and accidental means, causing death within three months from date of accident, the association will pay to the beneficiary hereinafter named if surviving, otherwise to the executors, administrators or legal representatives of the assured one thousand dollars, in monthly installments of one hundred dollars at the option of the association. The above amount in place of all other benefits. In case of death by accident the beneficiary shall be (full name) Castle Memorial U. B. Church, Relationship — Address E. 11 & Maple Sts.

Second. At the rate of twenty-five dollars per week during period of total disability, should aforesaid assured receive external visible bodily injury while this certificate is in full force, solely through external, violent, accidental and involuntary means other than such as shall result fatally, or in the loss of one or both hands, or feet, or both eyes, which shall independently of all other causes immediately following the receipt thereof, totally and continuously disable assured from performing any and every kind of labor or business, provided the period of indemnity shall not exceed twelve consecutive months.

In succeeding paragraphs there are other provisions as to benefits to be paid to the assured on account of total or partial disability, but they are not material for the determination of the questions presented.

In August following the issuance of this certificate, the said G. G. Oliphant met his death by being shot by some person unknown, and his administrator instituted action to recover the amount specified by the policy to be payable to the beneficiary named therein on account of accidental death. The defendant by demurrer to the petition which with amendments set out the facts above stated insisted that the beneficiary named in the certificate or policy was not such beneficiary as might under the statute be designated, and that by a statutory provision the policy was void. The statutory provision thus relied upon is as follows: "No association organized or operating under

this chapter shall issue a certificate of membership to any person under fifteen nor over sixty-five years of age, nor unless the beneficiary named in the certificate is the husband, wife, relative, legal representative, heir, creditor or legatee of the insured member, nor shall any such certificate be assigned. Any certificate issued or assignment made in violation of this section shall be void. The beneficiary named in the certificate may be changed at any time at the pleasure of the assured, as may be provided for in articles or by-laws, but no certificate issued for the benefit of a wife or children shall be thus changed so as to become payable to creditors." Code, section 1789.

For present purposes we may concede that, if the Castle Memorial Church were the only persons named in the policy to whom according to its terms any benefit would become payable on the happening of any of the conditions named in the policy, then such policy would be void for the reason that the beneficiary named is not one of the persons for whose benefit such an association as the defendant may issue a certificate to a member, and the statute expressly declares that any certificate issued in violation of such restriction as to beneficiaries shall be void. For instance, if the defendant association had been authorized to issue life policies and had issued such a policy to Oliphant solely payable to the Castle Memorial Church, it may be conceded that neither the church nor the administrator of the estate of Oliphant could recover thereunder on his death, and that the fact of receipt by the defendant association of the premiums or dues made payable by the assured would not estop it from interposing the defense. These concessions are made in view of the conclusions reached on another view of the case which seems not to have been considered by the trial judge in the opinion filed by him in the lower court sustaining the demurrer.

The view of the case not thus considered, and which

we think controlling, is the construction to be placed on this policy with reference to the beneficiary named therein.

i. BENEFIT
INSURANCE:
beneficiaries:
independent
provisions:
validity of
certificate.

It provides for payment under certain contingencies of weekly indemnity to the assured on certain conditions, and to this extent the assured is a beneficiary expressly named. Had the assured as the result of the injury inflicted upon him lost one of his hands or feet or both his eyes, he would have been entitled to receive under the policy the weekly indemnity stipulated, and we think that it would have been immaterial that another provision of the policy contemplated the payment in the event of death to the Castle Memorial Church of a death benefit, although the church was not a person to whom a benefit could be made payable. The policy was not therefore wholly void and inoperative from the beginning, unless the provision that on a certain contingency a death benefit should be paid to a beneficiary falling within the prohibited class of beneficiaries as specified in the statute must be construed as rendering invalid portions of the contract which were independent and in themselves valid. No authorities have been called to our attention holding that a stipulation in a contract which is prohibited by statute renders invalid other independent and self-sufficient stipulations. The statute prohibits the issuance of a certificate, unless the beneficiary named is within the list of persons for whose benefit such certificate is specially authorized to issue, but it does not provide expressly, or, as we can see, by implication, that if under independent provisions for different beneficiaries one of the beneficiaries named is within a prohibited class the certificate shall be void as to other beneficiaries for whom provisions may properly be made. We think it could not be reasonably claimed that under the section quoted an accident policy providing for weekly indemnity only in case of accident payable to the assured himself would be void.

As the policy was not therefore void *in toto* on account of the designation of the Castle Memorial Church as a possible beneficiary under certain conditions, we must inquire whether the provision for the payment of a death benefit to a prohibited beneficiary is void under the statute.

2. SAME: recovery of benefits. The language of the certificate is peculiar. Had there been no other provision with reference to the payment of a death benefit save that in the event of accidental death the sum specified should be paid to the Castle Memorial Church as beneficiary, we may concede for present purposes that the administrator of the member could not have recovered the specified amount; but this certificate does not so provide. The contract is, that subject to all the conditions of the certificates the association "will pay the assured the following benefits;" and among the benefits named is a death benefit which is to be paid "to the beneficiary hereinafter named, if surviving," otherwise such benefit is to be paid "to the executors, administrators or legal representatives of the assured." Had the beneficiary named been a person who could not properly be designated as beneficiary, nevertheless the administrator of the assured would have been entitled to recover the death benefit in the event that the beneficiary named had not survived; that is, in the event that there was no beneficiary in existence at the death of the assured. The certificate does therefore contemplate that, under certain conditions, the death benefit may be payable to the administrator of the assured. As the provision for payment of death benefit to the church was under the statute invalid, we think the case is one in which the beneficiary did not survive within the meaning of the certificate, and that the administrator was therefore entitled to recover. This conclusion is somewhat supported by the reasoning of this court in *Schmidt v. Northern Life Ass'n*, 112 Iowa, 41, and *Smith v. Knights of Maccabees*, 127 Iowa, 115. These cases are not directly in point as authority

in the present case, for they were decided under the provisions of Code section 1824, relating to fraternal benefit societies, and under that provision a certificate naming as beneficiary a person who is not one of the classes of persons who may be so named is not expressly declared to be void. But, having reached the conclusion that the certificate in question is not void *in toto* under Code, section 1789, we think we should apply the reasoning adopted in those cases in determining whether the administrator may recover the death benefit made payable to a prohibited beneficiary.

We reach the conclusion, therefore, that the issuance of the certificate in this case was not prohibited by Code, section 1789, and that as the beneficiary named as the person to whom the death benefit was made payable was not qualified to receive such benefit, the administrator of the estate of the deceased member was entitled to recover, especially in view of the general provision of the certificate that the benefits were payable to the assured, and the special provision that, if the beneficiary named should not survive, the death benefit should be payable to the administrator of the assured.

These considerations impel us to the conclusion that the trial court erred in sustaining defendant's demurrer to the petition, and that the judgment for defendant was erroneous.

The judgment is therefore *reversed*.

T. D. CARR and J. T. CROSS, Plaintiffs, v. DISTRICT COURT OF VAN BUREN COUNTY, IOWA, and C. W. VERMILION, Judge.

Injunction: VIOLATION: NOTICE. A defendant in an injunction proceeding is bound to obey the order of court even though erroneous and so held on final hearing: And this is true where he has actual notice of the order even though he had not been served with a copy of the writ.

Same. The violation of an injunctive order by any device or subterfuge will not be permitted; and the fact that defendants are public officers does not change the rule.

Contempt: DISCRETION: REVIEW. A proceeding to punish one for civil contempt is addressed to the discretion of the court, in the absence of statutory regulations, and its determination will stand unless gross abuse of such discretion is shown. And as a rule the appellate court in reviewing a contempt proceeding will not consider questions of fact.

Same. A contempt proceeding is in its nature criminal, or what may be termed *quasi*-criminal, and to warrant punishment a clear case of contempt must be shown.

Same: DEFENSES. Advice of counsel is not a defense to a proceeding to punish for contempt, although it may be considered in mitigation; nor is ignorance of the law in itself a defense in such cases except where criminality or guilt depends upon the intention with which the act is done; but changed conditions may always be considered in determining the question of guilt or innocence.

Municipal corporations: ISSUANCE OF WARRANTS: INJUNCTION: CONTEMPT. In this action the officers of a school district were enjoined from paying certain warrants, and upon holding the warrants invalid the court did not abuse its discretion in discharging the officials from an alleged contempt in proceeding to issue new warrants in place of the old ones, and in levying a special tax to meet the same, which act had been held lawful by the court and the new warrants had not been delivered or the old ones surrendered, and where the new warrants were to be paid out of the special tax levy which the officers had not been enjoined from

making; especially as the information for contempt had not then been filed and the legislature subsequently to the decree in injunction had legalized the original warrants.

Same. Although an unconstitutional statute is void and generally of no effect, still where it was enacted as a guide to public officials a very strong case must be made to justify their punishment for contempt in attempting to carry out the provisions of the statute.

Same. While the legislature can not change or modify a decree of court relating to private rights this rule does not apply in its full extent, if at all, to actions affecting municipal corporations which have been created as a part of the instrumentalities of government.

TUESDAY, JUNE 14, 1910.

CERTIORARI proceedings to the defendants to review an order made in a contempt proceeding brought against certain individuals as members of a school board and others as individuals holding evidences of indebtedness against the school district for violation of certain writs of injunction issued by the District Court of Van Buren County, which proceedings resulted in the discharge of the defendants and their complete exoneration. Petitioners in this case filed the information for contempt and are now prosecuting these certiorari proceedings. Order *affirmed*, and writ *dismissed*.

Walker & McBeth, for plaintiffs.

Hughes & McCoid, for defendants.

DEEMER, C. J.—This case has a peculiar history and is so much involved that we shall have some difficulty in stating it with any degree of brevity or clearness. In the year 1900 the independent school district of Farmington, in Van Buren county, which we shall hereafter call the "school district," pursuant to a special election of the

voters, issued and sold \$10,000 in bonds at par for the purpose of erecting a new schoolhouse. Some time thereafter the school board passed a resolution authorizing the issuance of school warrants to the amount of \$10,000 and directed their sale. The Farmers' Savings Bank purchased some of these warrants and thereafter brought suit thereon against the school district. In that action plaintiff in this proceeding, and others, intervened, alleging that the warrants were in excess of the constitutional limit and were void. They asked that the school district, through its officers, be enjoined from paying any of said warrants and the owners enjoined from collecting the same. On December 3, 1904, final decree was entered in this action, holding these warrants invalid, and the decree provided:

It is further ordered, adjudged, and decreed by the court that the defendants, the Farmington independent school district, and its treasurer, and his successors in office, be and they are hereby restrained and enjoined perpetually from paying any part of the balance of the principal or interest of, or on either of said warrants sued on and involved in this action, being warrants numbered 174, 175, 193, 197, 203, 267, 292, 297, 299, 309 and 310, as described above in this decree, other than the said sum of \$896.99 decreed above to be a part of the valid indebtedness of said school district. And it is further ordered, adjudged, and decreed by the court that the plaintiff the Farmers' Saving Bank and the defendants Fred Varnkall and John Mulvahill be and they are hereby restrained and enjoined from demanding, receiving, or collecting from said school district any part of the balance of said warrants described above, either principal or interest, other and except the said sum of \$896.99, as their rights therein and thereto may appear, and which is herein decreed to be a part of the valid indebtedness of said school district.

Thereafter the Thirty-Third General Assembly passed an act legalizing, or attempting to legalize, all the acts of the school district by what is known as chapter 281 of the

acts of that session of the Legislature. This act, after reciting all the proceedings of the school district from the beginning down to the time of the passage of the bill, concluded as follows:

Section 1. That all of the warrants on the school fund issued by the independent school district of Farmington, in Van Buren county, state of Iowa, through its board of directors, as above set forth, are hereby legalized and declared valid, and that the acts of said board in relation thereto are hereby declared to be valid and effectual as though all acts of said board had been in strict compliance with law.

Sec. 2. Nothing in this act shall affect in any way any pending litigation in relation to the subject matter hereof.

Among the recitals in the act were the following:

Whereas, the said board of directors by resolutions, passed by the unanimous vote thereof, at regularly called meetings of the board, held August 31, 1900, September 22, 1900, and September 29, 1900, authorized, in behalf of said district, the issuing of warrants aggregating a little over ten thousand dollars on the school fund of such district, which warrants were afterwards issued and are numbered 174, 175, 193, 197, 203, 267, 292, 297, 299 and 309 respectively; and, whereas, the proceeds of said warrants were necessary, and such proceeds were in fact used on the payment of the cost of construction and the equipment of said new school building; and, whereas, the aforesaid structure was completed and thoroughly equipped for the purpose intended, as before stated, by payment of the fair and reasonable cost only for the work and materials necessary therefor and said district has had the benefit of the full face value of said warrants; and, whereas, questions as to the legality of said warrants have arisen as to whether the said school district was within its authorized and legal power when said warrants were issued, and other doubts have arisen as to the regularity of the proceedings in relation thereto: Now and therefore, etc.

This act was passed April 7, 1909, and went into effect upon publication, which occurred April 13th of that year. Almost immediately after the passage of the act, and on April 9, 1909, plaintiffs herein filed a petition in the district court of Van Buren County in which they recited the history of the transaction relating to the issuance of the warrants, set forth the legalizing act, its invalidity, and asked that defendants in the suit be enjoined from paying the warrants referred to in said act and in prior proceedings, that the legalizing act be declared void, and that a time be fixed for the hearing of an application for a temporary writ of injunction. Pending final trial, the district court being then in session, an order was issued fixing the time for the hearing of the application for the temporary writ on April 16, 1909, at 10:00 o'clock a. m., and at the same time the district court made the following order: "It is further ordered that the said defendant, B. F. Ketchem, be and he is hereby, restrained from using or appropriating any of the funds, property, or money of the said school district of Farmington, in the payment of school warrants Nos. 174, 175, 193, 197, 203, 267, 292, 297, 299, 309 and 310, the payment of which was heretofore enjoined by decree of this court on the 3d day of December, 1904, until after the said hearing by this court on the application for temporary injunction as above ordered. It is further ordered that this order be served upon the defendant B. F. Ketchem at once." On the same day, to wit, April 9, 1909, the sheriff served a copy of this order upon the following named parties: B. F. Ketchem, treasurer; M. L. Barger, president; W. H. Coulter, secretary; George Junkins, director; H. F. Barton, director; A. H. Hartick and Joseph Steinmeyer, directors of the independent district of Farmington."

On April 15, 1909, the board of directors of the school

district met in special session, took up the matter of the school warrants, and passed a resolution containing, among other things, the following:

Whereas, the said vote authorized said school district to so take down said old building and erect the new school building of not less than ten rooms; and, whereas, after said building had been completed and furnished, or equipped as required, said school district did attempt to contract and pay by the issue of said warrants to the parties thereto entitled; and, whereas, it was found that said district was unable to make said contracts and pay for the same at the time; and, whereas, the said school district has never paid for said labor and materials, but has kept and still retains the value of said labor and material and retains the said school building for its use so erected and equipped; and, whereas, it may be that said school district has retained and still holds the said schoolhouse as trustees charged with the obligations aforesaid; and, whereas, it is just and equitable that said district pay for said materials and labor and retain the title and ownership of said buildings for the purpose intended; and, whereas, it now appears that said district can and is authorized by law to pay or make appropriations in payment for said labor and materials, and for the use of the money or value of said labor and materials for the time the said district has so retained the same: Now, therefore be it resolved, that the said school district does hereby agree with the parties now holding and owning the obligations of said independent school district to pay for said debts, and said school district will issue to such holders warrants in such denominations as shall pay for said liability, the principal of the dates where such labor and materials were furnished, with 6 percent interest thereon until the present date; and that said independent district does hereby order that warrants be drawn on its treasurer, duly signed and attested in said amounts and delivered to the parties thereto entitled. It is further ordered that the treasurer pay said warrants in whole, if there be on hands sufficient money therefor, and if not sufficient, that a tax be levied to collect such remainder, and the proceeds thereof be applied to the payment of said debt.

Pursuant to this resolution warrants were drawn up as follows:

No. 88, April 15, 1909, to Farmers' Savings Bank	\$4,000 00
No. 89, April 15, 1909, to Fred Varnkall...	603 01
No. 90, April 15, 1909, to Farmers' Savings Bank	1,000 00
No. 91, April 15, 1909, to Farmers' Savings Bank	1,000 00
No. 92, April 15, 1909, to Farmers' Savings Bank	1,000 00
No. 93, April 15, 1909, to Farmers' Savings Bank	1,000 00
No. 94, April 15, 1909, to Fred Varnkall...	307 53
No. 95, April 15, 1909, to John Mulvahill..	752 50
No. 96, April 15, 1909, to Henry Mulvahill.	753 30
No. 97, April 15, 1909, to Farmers' Savings Bank	628 06
Total.....	\$11,044 40

It is practically conceded that these new warrants were never delivered, and it is also admitted that the old ones were never surrendered or canceled. On the next day, the 16th, the application for the temporary writ on the new petition was heard and the matter taken under advisement, and on the 16th day of May a temporary writ of injunction was ordered as prayed. In the meantime, however, and on the 23d day of April, the board of directors again met and passed a resolution, the material parts of which are as follows: "Resolved that in payment of the building and equipment for the schoolhouse in said district, the said district agrees to levy a tax of seven mills, not to exceed that amount, in each and every year hereafter, beginning 1910, and ending 1916, both years inclusive, and to apply the same on certain warrants heretofore issued, numbered 90 to 97 inclusive, and that said school district will apply the same in payment of said warrants as fast as the

money therein is collected. It is further agreed that said warrants shall not constitute any general indebtedness of said school district, but that the holders thereof are to be paid solely out of said levy. This resolution to be in modification and amendment of the resolution of the school district herein passed and adopted 15th day of April, 1909, and that the holders of the warrants hereinbefore named shall present the warrants to be endorsed thereon the following words. 'The within warrant is to be payable solely out of a tax to be levied in the years, which the respective warrants are made payable.'

It seems that plaintiffs in the last injunction proceeding were not advised of the resolutions and action of the school board until after the submission of the application for the temporary writ of injunction, and they on the 30th day of April, 1909, filed informations for contempt against the defendants in the original action and the defendants in the action brought after the passage of the legalizing act, claiming that each of said defendants had violated the orders and decrees of the court in these actions. They were cited to appear before Hon. F. W. Eichelberger, judge, at Fairfield, Iowa, on May 7, 1909, where after a hearing they were bound over for final hearing at the August, 1909, term of the district court of Van Buren county. At the August term of said Van Buren county district court the matter was again brought up, and it was agreed that the contempt proceedings should be heard and tried with the action brought on April 9, 1909, for an injunction after the passage of the legalizing act, but that separate judgments should be entered in the cases. Trial was had accordingly, resulting in the following order in the contempt proceedings: "That the acts of said defendants in said contempt proceedings were valid and lawful, and not in violation of said original injunction nor in violation of said temporary injunction or restraining order in said case of Hartrick, Cross, and Carr against M. L. Barger and

others, but that all of said acts and doings were valid and lawful, and the said defendants, and each of them are found not guilty of such alleged contempt, but their said undertakings are exonerated and said defendants are discharged."

The petition for injunction in the second case was also dismissed at plaintiff's costs. This proceeding in this court is to test the validity of the order of the court discharging the defendants in the contempt proceedings. They were charged in the information filed against them of violating the original decree of December 3, 1904, and of violating the order made by the judge on April 9, 1909, in which defendant Ketchem was enjoined from issuing or appropriating any of the funds, property, or money of the school district in payment of the warrants theretofore issued by the board. The terms of these two orders have already been set out and need not be repeated here.

It is strenuously insisted by plaintiff's counsel that the trial court was in error in discharging the members of the school board and others upon the contempt proceedings.

They say that their conduct was in plain violation of the previous orders of the court, notice.

and that the legalizing act under which the school board and others assumed to act at their meetings on April 15th and 23d was and is unconstitutional, invalid and void, and constituted no excuse for their conduct. They ask us to reverse the action of the trial court in discharging these parties, and that we send the case back with orders to find the defendants in the orders and decrees guilty of contempt. Neither of the main suits are now before us and are not the subject of review in this proceeding. The decree of December 3, 1904, has not been appealed from, and, while we understand there is an appeal in the case brought after the passage of the legalizing act, that case is not now before us except in a collateral way.

The first premise in plaintiff's argument on this appeal to the effect that the defendants in the injunction proceedings were bound to obey the orders and decrees of the court, even if erroneous and held improvidently granted on final hearing, must, of course, be conceded. *State v. Baldwin*, 57 Iowa, 270; *Hatlestad v. Hardin District Court*, 137 Iowa, 146; *Ohlrogg v. District Court*, 126 Iowa, 247; *Langworthy v. McKelvey*, 25 Iowa, 55. And it is also true that a defendant in an injunction proceeding who has actual notice that a writ has been ordered or granted is as much bound by the order as if he had been duly served with the writ or a copy thereof. *Coffey v. Gamble*, 117 Iowa, 550; *Hawks v. Fellows*, 108 Iowa, 135; *Bartel v. Hobson*, 107 Iowa, 647.

Again, courts will not permit the violation of an injunctive order by any device or subterfuge if that device is a substantial violation of the injunction. *Lake v. Wolfe*, 108 Iowa, 184. And the fact that ^{2. SAME.} defendants are public officials does not in any manner change this rule. *Bass v. Shakopee*, 27 Minn. 250 (4 N. W. 619, 6 N. W. 776); *People v. Sturtevant*, 9 N. Y. 263 (59 Am. Dec. 536).

The last injunctive order issued before the filing of the information for contempt did no more than prohibit Ketchem from appropriating any of the funds, property, or money of the district to the payment of certain warrants, and there is no sufficient testimony to justify a holding that he or any of his codefendants did anything which would be in violation of this order before the informations were filed. The original decree of December 3, 1904, is broader than this subsequent order, and it is claimed for the defendants that this decree was superseded and set aside by the legalizing of the Legislature to which we have already referred. To this plaintiffs respond by saying that the Legislature has no power to set aside a decree of court in any case, and, assuming that it has

such power, the act in question is unconstitutional and void, because: (1) It is a special and not a general act; (2) it in effect creates a debt or allows a school district to contract a debt in excess of the constitutional limit; (3) because it is retroactive and not within the power of the Legislature; and (4) because it impairs the obligations of a contract and injures and destroys vested rights. In this proceeding there is a danger which we must avoid, to wit, that of passing upon the merits of the main case in this certiorari proceeding. This should not be done if it can be avoided.

Now we are thoroughly convinced that the evidence failed to show any violation of the injunctional order issued against Ketchem April 9, 1909. If there be a

violation of any order or decree, it is of the
3. CONTEMPT:
discretion: one passed December 3, 1904. But it must
review. be remembered, in this connection, that after

that decree was entered the Legislature in its sovereign capacity passed an act in which it expressly legalized and declared valid the warrants referred to in the original decree, and the acts of the board were declared to be as valid as though had in strict compliance with the law. That is what may be called a "civil contempt"—that is to say, it is charged in the information that the parties did something contrary to the order of the court in a civil action brought for the benefit of the opposing party—and it is quite generally held in such cases that an applicant is not entitled, as a matter of right, to an order for the commitment of a person for contempt. *People v. Durrant*, 116 Cal. 179 (48 Pac. 75). The application in such cases is addressed to the sound discretion of the court. *Joyce v. Holbrook*, 7 Abb. Prac. (N. Y.) 338; *Stephenson v. Hanson*, 6 Civ. Proc. (N. Y.) 43.

The general rule, in the absence of statutory regulation, is that the matter of dealing with contempts, and when and how they shall be punished, is within the sound dis-

cretion of the trial court, and, unless such discretion is grossly abused, the decision must stand. *State v. Archer*, 48 Iowa, 310; *Williams Rogers Co. v. Rogers*, 38 Conn. 121; *Bagley v. Scudder*, 66 Mich. 97 (33 N. W. 47); *Froman v. Froman*, 53 Mich. 581 (19 N. W. 193); *New York v. Ferry Co.*, 64 N. Y. 622. And as a rule a reviewing court will not consider questions of fact. *Holly Mfg. Co. v. Venner*, 143 N. Y. 639 (37 N. E. 648); *In re Pryor*, 18 Kan. 72 (26 Am. Rep. 747); *State v. McKinnon*, 8 Or. 487; *Turner v. Com.*, 2 Metc. (Ky.) 619.

The proceeding is in its nature criminal, or what might aptly be terminated "quasi criminal." *Grier v. Johnson*, 88 Iowa, 99; *Church of Bloomington v. Muscatine*, 2 Iowa, 69. And a clear case of contempt must be shown. *Verplank v. Hall*, 21 Mich. 469; *Slater v. Merritt*, 75 N. Y. 268; *Benbow v. Kellom*, 52 Minn. 433 (54 N. W. 482); *Sutton v. Davis*, 64 N. Y. 633.

And while advice of counsel is no defense, *West Jersey Traction Co. v. Camden*, 58 N. J. Law, 536 (37 Atl. 578); *Myers v. State*, 46 Ohio St. 473 (22 N. E. 43, 15 Am. St. Rep. 638), it may be considered

^{4. SAME.} <sup>5. SAME:
defenses.</sup> in mitigation. Ignorance of the law is not in itself a defense save where criminality or guilt depends upon the intention with which the act is done. *In re Contempt by Four Clerks*, 111 Ga. 89 (36 S. E. 237); *In re Contempt by Two Clerks*, 91 Ga. 113 (18 S. E. 976); *State v. Sparks*, 27 Tex. 705. But change of conditions may always be considered in determining the question of guilt or innocence. *Larrabee v. Selby*, 52 Cal. 506; *Mahoney v. Van Winkle*, 33 Cal. 448; *Pyron v. State ex rel. Lowe*, 8 Ga. 230; *Glover v. Board of Education*, 14 S. D. 139 (84 N. W. 761). The latter case is quite in point on this proposition. It is there said: "The changed conditions demanded summary steps to be

taken immediately after the boy was admitted, in compliance with the writ issued upon proof that his previous exclusion was unwarranted, and, as stated above, the fact that he was again suspended on the same day, pursuant to the simultaneous action of all the legally constituted health authorities does not constitute contempt."

Going now to the exact terms of the original decree, and looking to the testimony offered to support the information for contempt, it seems to us that the trial court

did not abuse its discretion in discharging
6. MUNICIPAL
CORPORATIONS:
issuance of
warrants:
injunction:
contempt.
the defendants from the alleged contempt. Especially is this true when we take into consideration the legalizing act passed by the Legislature some years after the original decree was passed. What defendants were attempting to do the trial court held was lawful. That is to say, they were proceeding to issue new warrants in place of the old ones and to levy a special tax to meet these warrants. The new warrants issued by them had not been delivered nor the old ones surrendered, and the new ones were to be paid out of a special tax levy which the defendants to the information had never been enjoined from levying, or at least had not been so enjoined when the information for contempt was filed. Prior to the filing of the information there had been no order of court forbidding defendants from levying a tax for the payment of the warrants which the Legislature attempted to legalize, and defendants were not proposing to pay the old warrants save through this tax levy. In what they did they were not, in our opinion, violating the terms of the original decree. At any rate, the trial court was justified, in view of the act of the Legislature before quoted, in holding that the defendants in the main action had not been shown guilty of a criminal or malicious intent to violate the previous orders of the court.

It is said, however, that this legalizing act was and is

unconstitutional, and that it afforded no protection to the defendants in the actions. True it is that an unconstitutional act is void, and generally speaking,
^{7. SAME.} of no effect. But when passed as a guide to public officials, and these officials are attempting to carry it out, we think it must be a very strong case to justify the punishment of such officials for carrying out, or attempting to carry out, the legislative will.

The main point made by plaintiff's counsel in this connection is that the Legislature had no right, power or authority to modify or in any manner change a decree
^{8. SAME.} of court. Of course this is the general, although not an universal, rule. The rule applies to private and individual rights, and not in full force, if at all, to actions affecting municipal or quasi municipal corporations or to bodies municipal or otherwise which have been created as a part of the instrumentalities of government. In its sovereign capacity the state may deal with these instrumentalities or governmental agencies in a manner quite different from its dealings with individuals or private corporations or municipal corporations insofar as their private rights are concerned. See, as supporting these views, *Guthrie Co. Bank v. Guthrie*, 173 U. S. 528 (19 Sup. Ct. 513, 43 L. Ed. 796); *Utter v. Franklin*, 172 U. S. 416 (19 Sup. Ct. 183, 43 L. Ed. 498). In the latter case there had been a judgment of court invalidating a bond issue which was afterward validated by act of Congress. See, also, *Richman v. Board*, 77 Iowa, 513; *McSurely v. McGrew*, 140 Iowa, 163.

There is no need for further discussion. Even if the act should be held invalid upon final hearing, this should not be made a ground for punishing these public officials who are attempting in good faith to follow it. A more orderly course of procedure, as it seems to us, would be to try out the issue of the validity of the act in a proper case, and, if necessary, secure a restraining order

from this court to preserve the *status quo* during the pendency of the appeal. We shall not in this proceeding determine definitely the constitutionality of the act in question. It is enough to say that according to the record defendants were not violating the original decree of injunction in attempting to carry out the subsequent act of the Legislature. That is the pivotal question in the case. Had they been enjoined from proceeding under this new law and were claiming immunity because they were following it, a very different question would arise. Here they had not been enjoined from so doing; but claim is made that in following it they are guilty of contempt because of a prior decree passed long before the act in question went into effect. No such case is presented as would justify us in interfering with the order of the trial court.

The order of discharge must, therefore, be affirmed, and the writ heretofore issued dismissed. *Affirmed* and writ *dismissed*.

MARTIN NEILAN, Appellant v. UNITY INVESTMENT COMPANY, Appellee.

Taxation: SALE OF PROPERTY: REDEMPTION: NOTICE. To cut off an owner's title by a sale of the land for taxes and issuance of a tax deed, statutory notice of the expiration of the time of redemption must be given; and where such notice is not given the defendant in a suit to quiet title by the holder of the tax deed need not allege payment of the taxes on which the sale and deed are based, but an offer to pay the same as found due, or which he is required in equity to pay, is sufficient.

Same: REDEMPTION: LIMITATION. Notice of expiration of the time of redemption from a tax sale must be personally served upon a resident owner; the service can not be made by publication. And when attempted to be made by publication it is in effect no notice and the property remains subject to redemption by the owner notwithstanding the five-year bar in certain cases provided by the statute. And this rule obtains where an invalid sale had been made because of unpaid grading taxes.

Appeal from Woodbury District Court.—Hon. F. R. Gaynor, Judge.

TUESDAY, JUNE 14, 1910.

SUIT in equity to quiet plaintiff's title in and to a certain lot in the city of Sioux City. To defendant's answer and counterclaim plaintiff filed a demurrer, which demurrer was overruled, and plaintiff appeals. *Affirmed.*

Martin Neilan, pro se.

F. W. Lohr, for appellee.

DEEMER, C. J.—Plaintiff's action is founded on a tax title based upon a sale of the property for the taxes of the years 1893, 1894, 1895 and 1896, and a deed issued by the county treasurer pursuant thereto April 12, 1901. Plaintiff alleged that he had paid all taxes upon the lot to date, and that one Frank Anderson was the owner of the lot at the time of the tax sale. Plaintiff also pleaded in his petition certain matters regarding the conduct of Anderson and the defendant which he relied upon as an estoppel. Defendant in answer denied all the allegations of the petition, save those admitted, and further alleged that it was the owner of the lot, and that there were no unpaid taxes against it. It admitted the sale of the lot for taxes to the plaintiff for the sum of \$1.07, and further pleaded that the delinquent taxes for each of the years for which the property was sold were not brought forward as required by law; that the auditor and treasurer did not keep proper records of the tax sale; that some of the taxes for which the lot was sold were not properly levied and were without any authority in law; that, although Frank Anderson was at all times material to our inquiry a resident of Woodbury county, no notice

was served upon him of the expiration of the time of redemption as provided by law, although notice by publication was given; that the land was assessed to Anderson; that the notice of publication was insufficient, in that it did not state under whose direction it was made; that the lot had been unimproved and unoccupied until the spring of the year 1908, when defendant took possession thereof and has since occupied the same, plaintiff never having been in the possession thereof; that all taxes paid by plaintiff more than five years before the commencement of this suit are barred; that more than eight years have elapsed since the issuance of the tax deed, and that action thereon is barred; that some of the taxes for which the lot was sold were for grading streets of the city for which no tax could legally be levied; and that by reason of all of these facts the tax deed is invalid. By way of counterclaim defendant pleaded title in itself, and further averred that the Unity Investment Company is ready and willing, and hereby offers and tenders, to pay the full amount of all valid and subsisting taxes, interest, and penalties, including costs, justly chargeable against said real estate because of said taxes and tax sale, together with all costs of this action up to the time of the filing of this answer and counterclaim.

The prayer was as follows: "Defendants pray judgment dismissing the action of the plaintiff; that defendants have judgment quieting their title to said real estate against the adverse claims of the plaintiff; that said taxes, tax sale, and tax deed be declared null and void and of no further force or effect; that the same be canceled of record and defendants have judgment for costs and such other and further relief as may be equitable."

The demurrer challenged the sufficiency of these allegations of the answer and counterclaim, and it is strenuously argued they do not constitute a defense or a ground for affirmative relief for the reasons (1) that the

answer does not show that all taxes upon the lot were paid by Anderson or the defendant; (2) that the answer shows notice of redemption upon Frank Anderson by publication; (3) that the defendants are barred and estopped from claiming title because they were not in possession until the spring of the year 1908, and made no attack upon the tax deed until more than five years after it was issued; and (4) that defendants are estopped from challenging the grading tax because no protest was made against the same until the answer was filed.

We have to determine then the sufficiency of the allegations of the answer and counterclaim. Counsel contended that they are insufficient because they do not 1. **TAXATION: sale of property: redemption: notice.** allege the payment of taxes for the years 1893, 1894, 1895 and 1896. As no sufficient notice of the expiration of the time

of redemption was given, defendant was not required to plead the payment of those taxes. Without such notice defendant's title could not be cut off, and it was enough for it to offer to pay such taxes as were found due or which it was required in equity to pay. As plaintiff alleged the payment of all subsequent taxes, defendant was under no obligation to pay these, save as it might be required to do so to effectuate a redemption. *Lynn v. Morse*, 76 Iowa, 665; *Wilkin v. Wilkin*, 91 Iowa, 652; *Adams v. Snow*, 65 Iowa, 435; *Nichodemus v. Young*, 90 Iowa, 423.

Code, section 1448, reads as follows: "No action for the recovery of real estate sold for the nonpayment of taxes shall be brought after five years from the execution

2. **SAME: redemption: limitation.** and recording of the treasurer's deed, unless the owner is at the time of the sale, a minor, insane person or convict in the penitentiary, in which case such action must be brought within five years after such disability is removed." Claim is made that plaintiff's title became perfect under this

section, and that defendant can not challenge it. Such facts are pleaded in the answer regarding the inclusion of a grading tax as would make the sale void, and it is also shown that no proper notice of the expiration of the redemption period was given. *Gallaher v. Garland*, 126 Iowa, 206; *Carter v. Cemansky*, 126 Iowa, 506. Notice by publication being unauthorized under the facts pleaded, it is the same as no notice. Under these facts, it has been repeatedly held that section 1448 does not apply. *Chicago, B. & Q. R. R. v. Kelley*, 105 Iowa, 106; *Slyfield v. Barnum*, 71 Iowa, 245; *Bowers v. Hallock*, 71 Iowa, 218; *Cornoy v. Wetmore*, 92 Iowa, 100; *Shelley v. Smith*, 97 Iowa, 259; *Wilson v. Russell*, 73 Iowa, 395; *Swan v. Harvey*, 117 Iowa, 58; *Iowa Loan & T. Co. v. Pond*, 128 Iowa, 600. Notice by publication upon resident owners doubtless might have been authorized by the Legislature; but we find no statute so providing. Indeed, the statute seems to require personal service upon residents. Code, section 1441. Plaintiff's tax deed, under the allegations of the answer and counterclaim, was invalid because no notice of redemption was given, and for the further reason that it was based upon a sale of the lot for unpaid taxes for grading purposes. These facts not only made the property subject to redemption, but they remove the five-year bar created by section 1448 of the Code.

The ruling on the demurrer was correct, and the judgment must be, and it is, *affirmed*.

MORRIS J. HAMM, Appellee, v. BETTENDORF AXLE COMPANY, Appellant.

Master and servant: SAFE PLACE TO WORK: LIABILITY FOR ACTS OF FELLOW SERVANT. The master is not liable to one servant for the negligence of a fellow servant, especially where they are engaged in the same common employment. Ordinarily his duty in the

first instance is discharged by furnishing a reasonably safe place to work, a sufficient number of competent employees, the necessary appliances and proper materials; but he is under a continuing duty to inspect and keep the place reasonably safe and to establish rules and precautions for doing the work.

Same: NEGLIGENCE: DUTY TO WARN: DELEGATION OF DUTY: EVIDENCE.

2 It is the duty of the master to warn an employee of dangers arising out of the progress of the work known to the master but unknown to the employee; and even though the employer is not under obligation to discover danger, still if he is informed of the same his duty to warn and use ordinary care for the safety of an employee arises. And this duty can not be delegated so as to relieve the master from liability for failure to perform the same, but the negligence of a foreman in this respect, in charge of the work, is the negligence of the master.

In this action plaintiff was injured by the fall of a pile of iron or steel plates upon which he was at work, and the evidence shows that the same were so piled as to be likely to fall; and there was testimony to the effect that the foreman directly in charge of plaintiff's work was warned of this fact while the pile was being made but gave the matter no attention, and it is held that the evidence of the foreman's negligence was sufficient to support a verdict for plaintiff.

Same: ASSUMPTION OF RISK: BURDEN OF PROOF: INSTRUCTIONS. In an 3 action for injuries to a servant the master has the burden of proving an assumption of the risk growing out of the negligent performance of his duties.

Appeal: REVIEW OF EXCEPTIONS NOT ARGUED. Where the exceptions 4 to instructions are not argued and no complaint against them is embodied in appellant's brief they will not be considered on appeal.

*Appeal from Scott District Court.—Hon. A. J. House,
Judge.*

WEDNESDAY, MARCH 9, 1910.

ACTION at law to recover damages for injuries received by plaintiff while in defendant's employ due to the fall of iron or steel plates upon him while at work at one of defendant's machines. Trial to a jury, verdict and judgment for plaintiff, and defendant appeals. *Affirmed.*

T. A. Murphy, Cook & Balluff, and A. G. Sampson,
for appellant.

Eby & Bush, for appellee.

DEEMER, C. J.—Plaintiff, while employed in what is known as defendant's bolster department, in its factory, at Bettendorf, Iowa, was injured by reason of the fall of a pile of steel plates which had been created or erected by other employees in the prosecution of their work. Plaintiff had been in defendant's employ about a year and a half before receiving his injuries, and was at the time he was injured in the bolster department, where he operated or helped to operate presses which shaped, squared and sheared beams, bolts, bands and plates, bolsters made of "I" beams, plates, rivets, etc., the beams being shaped by machinery, and they have a plate which goes on the bottom of the bolster when completed. These plates are punched by machinery in the bolster department; but the riveting is done elsewhere. When injured, plaintiff was working as a helper on a punching press—a machine used for punching holes in steel plates. The operator of the machine was one Tom Date. Thomas Cain was the foreman of the bolster department, and plaintiff took his orders from this foreman. By direction of the foreman he had been helping Date, and had been so working for about two days prior to his injury. The day before the accident he had been punching plates which were piled about the machine, and, as it had been determined to use a smaller plate, on the next day, Saturday, he and Date began early in the morning changing the dies on the machine. While they were so engaged, other workmen employed in and about the bolster department were bringing in the smaller sized steel plates, and piling them up around and about the machine. The men were instructed about the number to bring in; but were not told how high to pile them. The

plates were so piled that they were about ten feet long and nine inches wide. There were four tiers piled up from the ground, and on top of these were three tiers so placed as to bind the four, and the entire pile was about four feet high. These plates had been stored out of doors in the steel yard, and some of them were covered with ice and snow, sometimes in the form of ridges. Others of the plates were crooked, and the men in piling them used little blocks or slugs to even them up as they went along. Because of the presence of the ice and snow and of the crooked condition of the plates, it is manifest that the pile was likely to slide and fall, and this is what eventually happened, to the injury of the plaintiff.

The work of changing the dies was completed about noon, and immediately after the noon hour plaintiff and Date began running plates through the press; plaintiff taking the plates from the pile and feeding them into the machine. He was taking plates from one of the short tiers on top of the pile, and had fed twenty or twenty-five into the machine, when the pile fell while his back was turned, falling upon him, breaking his leg, and otherwise injuring him. The plates were piled upon a brick floor, and no complaint is made of the foundation. The charges of negligence which the court submitted to the jury were (1) knowledge of the foreman, Cain, of the unsafe condition of the pile of plates a sufficient length of time before the injury to have remedied the defects before the injury occurred; and (2) failure of the foreman to warn plaintiff of the dangers incident to the pile of plates after the foreman knew or should have known of the condition.

We can best present the plaintiff's theory by here copying the instructions bearing upon these issues:

(7) It appears that such plates were placed and piled by the plaintiff's coemployees, whose negligence, if any, in so doing, was assumed by plaintiff when entering such employment. If, therefore, you find such plates as piled

were not reasonably safe, such condition under the law would be considered the result of the negligence of such coemployees, and as such was assumed by plaintiff, and hence defendant would not be responsible therefor; but if the defendant through its foreman knew, or had reasonable grounds to know, of such unsafe condition, and had such knowledge a sufficient length of time before the accident resulting in the injury to plaintiff to have prevented the injury to plaintiff while acting in the exercise of reasonable care and prudence to protect its employees from injury, then it was its duty to so do.

(9) The second ground of negligence is that the defendant failed to warn plaintiff of the condition of such pile of plates and the risks and dangers thereof. The duty to warn the plaintiff did not arise unless the defendant knew, or had reasonable ground to know, that such pile of plates was then unsafe, and not then unless the defendant had reasonable grounds to know that the plaintiff was ignorant, not only of the condition of such plates, but the risks incident thereto. Hence, if you fail to find that the defendant had reasonable grounds to believe that the plaintiff was ignorant of the condition of such plates, or fail to find that the plaintiff did not know of the risks and dangers therefrom, or fail to find that such pile of plates was unsafe, or fail to find that the defendant knew that such plates were unsafe, if so, then in either of such events the duty to warn plaintiff did not arise, and in such case the defendant can not be held to have been negligent in failing to warn the plaintiff of the condition of such plates and of the dangers, if any, arising therefrom. But if you find that such pile of plates were not in reasonably safe condition, and that the defendant knew thereof, and knew that by reason thereof it was dangerous, and had reason to know that the plaintiff did not know thereof and would not discover such danger while in the exercise of reasonable care and prudence to prevent injury to himself, and further find that defendant knew of such matters in time that by the exercise of reasonable care and prudence to warn plaintiff thereof and thus avoid injury therefrom to plaintiff, then on your so finding you would be warranted in finding that defendant was negligent in failing to warn the plaintiff of such dangers.

The fundamental proposition relied upon by defendant for reversal is that no actionable negligence of the defendant is either pleaded or proved. It is contended that the negligence of plaintiffs' fellow servants in piling and handling the plates was one of the risks which he, plaintiff, assumed when he entered defendant's employment; that the bringing in and piling of the plates for use at the machine was a necessary incident of the work; and that the negligence, if any, with reference to the handling of the plates, was that of fellow servants, for whose acts defendant was not responsible. These, of course, are elementary principles of the law of master and servant, and, if this were the entire case, we would have no difficulty in sustaining the appeal by reversing the judgment. But it will be noticed that the negligence charged was that of the foreman, Cain, who it is claimed was the *alter ego* of the defendant, and that for his acts either of omission or commission defendant was responsible. It is also contended that the acts of negligence charged against Cain were nondelegable in character, in that it was his duty to see that the place where plaintiff worked was safe and kept safe for him during the progress of the work; that it was his duty to observe the condition and to warn and protect him from dangers arising out of the negligence of coemployees.

It is hornbook law that a master is not liable to one servant for the negligence of a fellow servant, especially where they are engaged in the same common employment.

I. MASTER AND SERVANT: safe place to work: liability for acts of fellow servant.

The master has ordinarily fulfilled his duty in this respect when he has furnished his employee with a reasonably safe place to work, has supplied a sufficient number of competent servants, and the necessary appliances and proper materials. He ordinarily is not expected to be present at all times to see to the conduct of the work; for having supplied the necessary number of reasonably com-

petent servants, and the necessary appliances and materials, he may reasonably assume that the work will be properly done. However, he is under a continuing duty of inspection to keep the place in a reasonably safe condition for work, of establishing rules for the conduct of the work, and of formulating reasonable rules and precautions for the doing of the work. Whether or not defendant was responsible for the acts and conduct of the foreman, Cain, is a mixed question of law and fact, and for the solution thereof we must first go to the testimony. There can be no doubt under the evidence that the plates were so piled as to be likely to fall, and there is testimony to the effect that Cain was warned of this while the pile was being made, and that he told the employee making the complaint to mind his own business.

Cain testified with reference to this as follows:

I told the men what work to do and what work not to do, and discharged men if I had reason to do so and saw fit in my department. The men in that department were subject to my orders as to their work there, and I instructed them what to do and gave them any instructions as to how to do it. That was my duty. I had general charge of the department. Generally, if there was anything wrong in that department, it was reported to me by the men in the department. If it was something that I could fix, I would go ahead and fix it, or have it fixed. As far as my work went, it was my duty to have supervision over that department, and see that things were in the shape that they should be. Hamm was under my direction at that time, and I told him to go and help Tom at that machine. I knew he would do what I told him to. I knew these men were hauling plates and piling them up right there where they were piled. I was around that department watching the work and seeing that things were going the way they ought to. . . . If Varner and any of these fellows that was working there saw something that was piled up there in a dangerous manner, it was their business to tell me and my business to fix it. It was my

business to be there and generally oversee and supervise the work. It was my business to get that material and get it shaped up and put in the shape of these bolsters. That is my department, and my instructions or schedule are simply to get out so much work, and I get out so much work. The details of it, that is my business to attend to.

He also testified with reference to the plates as follows:

I knew these men were hauling plates and piling them right up there where they piled them. I told their foreman to send those plates in, and have them piled by those machines. I knew these plates were coming in from outdoors. I knew that sometimes these plates had snow or ice on them. I saw these men piling up these plates alongside of that machine. I knew it was cold weather. I knew there had been sleet and snow during the winter. I knew generally that if there was snow and ice, if it was cold weather and they were out of doors, it would freeze on the plates. I noticed how high they were piling them before the accident happened.

Other witnesses testified regarding the piling of the plates as follows:

The plates we took in there were small plates about nine or twelve feet long and about ten inches wide. I can not remember how thick. When we brought these plates into the shop, there was ice and snow on a portion of them. On some of them there were ridges of ice and snow, more or less. . . . I have helped bring in material that had ice and snow on it before this. In the winter time, when there comes snow or rain and it is freezing, it sticks to the plates. I worked there nearly three winters. During all that time plates have been stored outdoors. When plates were stored outdoors in the winter, there might be snow or ice on them when I brought them into the shop. This had been true during the three years I worked there. I never received any instructions about putting in crosspieces or as to removing snow or ice. Snow and ice gets on the plates from bad weather. The effect that has on the plates when piled up in the shop is that they slide easily,

easily fall over. I had been piling up plates that had ice and snow on them pretty nearly three winters. After these plates were piled, they were standing straight. They were standing good. These plates were stored in the yard. They were piled one on top of another plate. All the ice there would be on them would be what could run between, and that would be only a thin sheet of ice. When they were piled in the yard, there was little pieces used there in making up the pile. In piling plates there would easily be some crooked ones that we would have to block a little. Sometimes, when the plates were crooked, we slipped one of those slugs in, and sometimes used little blocks of wood about half an inch thick, and sometimes a quarter of an inch and sometimes an inch. I used little blocks like that during all the time I piled plates there. I do not think there was ice on every plate, but there was on a good many. In the winter time there would be ice on most of them. This ice would be just a thin sheet wherever the plate happened to be crooked and standing apart, so that the water could run between. In taking plates off the pile out in the yard, they would be frozen together, and we would have to break them apart. We would take a hammer and knock them. I think we piled these plates between forty and forty-five inches high that morning. That is the whole pile. No matter what the reason for that unevenness, whether it was the bending of the plate or the ice, we put a block in there to even it up. If a bent plate lies on another one in a pile in the yard, it leaves a hollow space under the bent plate. If the snow and ice would run right in there under this hollow plate, it would form on the plate below it. When we hauled these plates into the shop, we didn't put them back on the pile just in the order they were taken off the other pile. In piling those plates there when you would come to a plate where for some reason a plate would not lie level, we would put a piece of wood or one of those pieces of iron under it and level it. That is the way we piled those at Hamm's machine that morning.

There was ice on the plates we took off Mr. Hamm. It was kind of thin sheets and chunks in other places. This ice was from a quarter of an inch thick down to very thin. The plates were wet from the melting of the ice.

This ice was frozen fast to the plates. After the pile fell over, there was still ice frozen to the plates.

The plates that were used there at the plant were stored out in the yard at the east end. There was no cover over them. I had seen ice on plates that they used there. When the plates commenced to thaw, they were slippery. The plates that had fallen on Hamm were icy, and some of them were bent a trifle. In some places there was no ice on. It was different thicknesses. With these plates piled in that way, I suppose the ice would melt first where the heat hit it first from the outside. There was ice on the plates that fell. That was still on the plates after the plates fell down, and was frozen fast to the plates.

From this it appears that Cain had charge of the department, that it was his duty to see that everything was going right, and that, if he saw anything in a dangerous

2. SAME:
negligence:
duty to warn:
delegation
of duty:
evidence. condition, it was his duty to fix it. Plaintiff, Hamm, had never worked about this machine, save for a few days before he was hurt, and, when the plates were being piled, he was at work changing the dies upon the machine with his back to the pile of plates which was being made by other workmen. The pile was left straight and apparently plumb, and there was nothing in its outward appearance which suggested any dangers. Cain was informed as to conditions and was warned of the danger of the pile due to the presence of snow and ice; but he did not warn plaintiff nor did he do anything to eradicate the dangers. These facts bring the case within the rule of *Rigsby v. Supply Co.*, 108 S. W. 1128; *Newcastle v. Doughty*, 168 Ind. 259 (79 N. E. 485); *Smith v. Lidgerwood*, 56 App. Div. 528 (67 N. Y. Supp. 533); *Kerker v. Bettendorf Co.*, 140 Iowa, 209; *Beresford v. Coal Co.*, 124 Iowa, 34; *Foley v. Packing Co.*, 119 Iowa, 225; *Clark v. Telephone Co.*, 146 Iowa, 428; *Rodgers v. Lumber Co.* (Or.) 102 Pac. 601 (103 Pac. 514); *Long v. Telephone Co.*, 134 Iowa, 336; *Halwas v. Granite Co.* (Wis.) 123 N. W. 789;

Meagher v. Machinery Co., 187 Mass. 586 (73 N. E. 853); *Indianapolis Co. v. Wachstetter* (Ind. App.) 88 N. E. 853. These cases all proceed upon the theory that it is the duty of a master to warn its employees of dangers arising out of the progress of the work known to it but unknown to the employee. This duty arises out of the obligation to furnish the employee a reasonably safe place to work and to use reasonable care to keep it in a safe condition. Even if the employer were not obliged to discover the danger, still, if he is informed or is aware thereof, it is his duty to warn other employees and to use ordinary and reasonable care for their safety. In *Brann v. Railroad*, 53 Iowa, 595, it is said: "As the corporation must act through agents and employees, the negligence of the employee upon whom the duty of inspection is devolved is the negligence of the corporation. The brakemen on freight trains and such inspector can not be regarded as coemployees in such sense as to prevent the former from recovering of the corporation because of the negligence of the latter."

The rule governing such cases as this is well stated in 1 Labatt, Master & Servant, section 29. This section reads as follows: "Where the abnormal conditions which caused the injury are shown to have been originally produced by a cause for which the master was not responsible, the action is or is not maintainable according as it may appear that he was or was not guilty of a subsequent and distinct breach of duty in having failed to ascertain the existence of those conditions, or in having omitted after discovering them to take such steps as might be appropriate for the protection of his servants. This principle is applicable whether the abnormal conditions result from the act of a stranger or a fellow servant, who is not a vice principal." In *Kerker's* case, *supra*, we said: "Where an employer knows the danger to which his servant will be exposed in the performance of any labor to which he assigns him and

does not give him sufficient and reasonable knowledge thereof, its danger not being obvious, and the servant without negligence on his part, through inexperience or through reliance on the direction given, fails to perceive and understand the risk and is injured, the employer is responsible." And in *Beresford's* case, *supra*, we said: "The duties for which a master can not escape liability by delegating their performance to his agents or servants

. . . include the obligation of furnishing the servant with a safe place to work, . . . to give the servant timely warning of dangers which are known, or ought to be known, to the master, but are neither known nor patent to the servant, . . . to exercise such discretion, supervision and control over the work as may be required to carry on the same with reasonable safety to all employees therein." Again in *Clark's* case, *supra*, we said: "In a general way it is contended that the obligation of defendant to furnish plaintiff a safe place to work did not exist in this case because the place plaintiff was working in was rendered unsafe in the very employment in which plaintiff was engaged. In other words, that the work of repair in which plaintiff was engaged necessarily involved dangers of which he was charged with knowledge. The well-settled principle involved, however, did not, as we think, relieve defendant from liability if its foreman directed the plaintiff to work under conditions which were to his knowledge, as a reasonably prudent man, particularly dangerous on account of the failure of defendant to take precautions as to the prosecution of the work which a reasonably prudent employer would have taken for the safety of his employees."

The cases relied upon by appellants' counsel announce no contrary doctrine. They adhere to and affirm general principles already announced in this opinion, and do not apply to a case where a foreman in charge of a department whose duty it is to keep things straight, to watch the work,

and to fix anything which might become unsafe. These duties on the part of the foreman in charge of a department are nondelegable in character, and the negligence of such foreman is the negligence of the master. Of course, it is not the rank or grade of employment which determines the character of the service, but the nature of the duty to be performed which gives color to the employee's act. The duty to inspect or to warn is material in character, and, as we have already said, can not be delegated. We have already pointed out this distinction in many cases, as will be observed by reference to the following: *Jacobson v. U. S. Gypsum Co.*, 144 Iowa, 1; *Hendrickson v. Gypsum Co.*, 133 Iowa, 89; *Schminkey v. Sinclair Co.*, 137 Iowa, 130; *Streicher v. Davenport Co.* (Iowa), 124 N. W., 327. See also, *Anderson v. Pittsburgh Co.*, 108 Minn. 455 (122 N. W. 794).

II. Of the instructions complained of we shall note but one. It reads as follows:

(12) If the condition of such plates or their liability to fall was apparent, or if by casual observation the plaintiff as a reasonable, careful and prudent person would have known of the condition of such plates, and as such a person would have appreciated the dangers arising therefrom, then you will be warranted in finding the plaintiff assumed the risks and dangers, and, if you so find, you should return a verdict for defendant.

3. SAME:
assumption
of risk:
burden of
proof:
instructions.

On the other hand, if you fail to find that the defendant as a reasonable man did not, and was not bound to, appreciate the risks and dangers incident to the then condition of such plates, then he can not properly be held to have assumed the risks and dangers, if any, arising therefrom.

In the last paragraph of this instruction the trial court used the word "defendant" instead of the word "plaintiff" as intended. Substituting the word "plaintiff" for "defendant," still the instruction is not clear, although

the thought which the court intended to express is apparent to the legal mind. What the court intended to state was that, if plaintiff as a reasonably prudent man did not and was not bound to appreciate the risks and dangers incident to the condition of the plates, then he could not properly be held to have assumed the risk. Attempt was made to shift the burden upon plaintiff of showing that he did not know of or was not bound to appreciate the risks and dangers incident to the piling of the plates, although this was very clumsily done. Instruction 11 should be read in connection with No. 12. It is in this language: "(11) In entering the employment of the defendant the plaintiff assumed the risks and dangers incident to the work in which he engaged, including such as arise from unsafe conditions created through the negligence of his coemployees as hereinbefore stated, but he did not assume the risks and dangers arising from the negligence of the defendant, if any. The defendant alleges that the plaintiff knew of the condition of such pile of plates, and that he appreciated the dangers arising from its then condition. If you find such alleged facts established by the evidence, then the plaintiff must be held to have assumed the dangers incident to such plates as piled, and this, although you find the defendant was negligent in either or both of the particulars charged." The assumption of risk here referred to was not that growing out of a proper performance of the work by the defendant, but out of the negligent performance of its duties, and the burden of proving the assumption of such risk is upon the defendant, so that, even if the instruction had been given in the form the court intended, it would have been erroneous insofar as it applied to the burden of proof. *Mayes v. Railroad*, 63 Iowa, 562; *Wells v. Railroad*, 56 Iowa, 520. The paragraph complained of aside from this question of burden of proof was intended to be in plaintiff's favor, stating the other side of the proposition already given in the first paragraph of the

instruction, and, as it was intended for plaintiff's benefit, no harm resulted. The first paragraph, which is clear, covered the case from defendant's standpoint, and in it there was no error. The latter paragraph, being at most unintelligible and meaning nothing, could not have prejudiced the defendant, for it had the benefit of all it was entitled to in this connection. The paragraph complained of is erroneous because not intelligible; but we are of opinion that no prejudice would have resulted to defendant therefrom. There is one other way the instruction might be interpreted if we substitute the word plaintiff for defendant, and that is that if the jury could not say that plaintiff did not and was not bound to appreciate the risks and dangers, etc., then he could not be held to have assumed the risk. Remembering that the burden was upon defendant on this issue, the instruction so read would not be erroneous. No matter what the construction, we are abidingly satisfied that defendant suffered no prejudice therefrom.

III. So little reliance is placed upon exceptions to other instructions that defendant's counsel has failed to

4. **APPEAL:** review of exceptions not argued. argue them or to embody any complaints against them in its points and propositions relied upon for a reversal. For this reason, we are not called upon to consider these exceptions.

Finding no prejudicial error, the judgment must be, and it is, *affirmed*.

THE CITIZENS NATIONAL BANK, of Washington, Iowa,
Appellant, v. R. W. GARDNER, WILBUR GARDNER,
as Guardian of R. W. GARDNER, MATILDA GARDNER,
and others, Appellees.

Chattel mortgages: MENTAL CAPACITY OF MORTGAGOR: EVIDENCE. In this action which is a suit upon promissory notes and to foreclose chattel mortgages securing the same, the evidence is reviewed and held to show mental incapacity of the mortgagor at the time he executed the notes and mortgages in question.

Same: NOTICE. The evidence is also reviewed and held sufficient
2 to charge the mortgagee with notice of the mental incapacity of
the mortgagor.

**Same: COUNTERCLAIM BY GUARDIAN: ADMISSION OF PLAINTIFF'S CAUSE
3 OF ACTION.** A guardian of an incompetent chattel mortgagor may,
as in this case, counterclaim against a suit to foreclose the mort-
gages for payments made by the mortgagor from a sale of part
of the mortgaged property, without conceding thereby the validity
of the mortgages.

Taxation of costs. Where the only issue in a suit to enforce a
4 chattel mortgage was the mental capacity of the mortgagor at
the time of executing the same, which was determined against
the plaintiff, the costs of the action were properly taxed to
plaintiff.

Judgments: CORRECTION OF SAME. The correction of a judgment
5 entry so as to conform to the appellant's demand for recovery,
although made subsequent to notice of appeal, will not necessi-
tate a reversal of the case on that ground.

Appeal: REVIEW OF PARTICULAR ISSUES. Where no appeal is taken
6 from the judgment upon particular issues the same will not be
reviewed although argued on the appeal.

Taxation of costs. Where the plaintiff, as in this action, brought
7 certain parties into court and the substantial issues were deter-
mined against its claims to a preference over them in the distri-
bution of a particular fund, the costs of the action were properly
taxed against plaintiff.

*Appeal from Washington District Court.—Hon. W. G.
CLEMENTS, Judge.*

MONDAY, MARCH 14, 1910.

ACTION in equity to recover the amount of certain
promissory notes made by the defendant, R. W. Gardner,
and to foreclose two chattel mortgages securing the same.
There was a decree for a recovery by plaintiff for the
amount of the notes sued upon with attorney's fees, but
denying a foreclosure of the mortgages. The plaintiff
appeals. *Affirmed,*

W. M. Keeley and W. H. Butterfield, for appellant.

Eicher & Livingston, Wilson & Wilson, Charles A. Dewey, and S. W. & J. L. Brookhart, for appellees.

WEAVER, J.—While the pleadings and evidence in this case are very voluminous and have necessitated the examination by us of over four hundred pages of printed abstracts, the ultimate questions of fact and of law are not very difficult. R. W. Gardner, an unmarried man of forty years of age, lived in the parental home from the time of his arriving at his majority, and during most of the time leased and operated a farm belonging to his mother. During the later years preceding the transaction here in controversy, he also held in his own name an equity in another one hundred and sixty acres of land in the same neighborhood. He had been, for a considerable period, engaged in buying, feeding, and selling cattle and hogs, and in that business became indebted to the plaintiff bank and to the Citizen' Savings Bank of Washington, Iowa, which indebtedness was evidenced by six several promissory notes of the said Gardner to the plaintiff and two other notes executed by him to the savings bank, both of which have since been transferred to the plaintiff. On October 15, 1907, the president and the attorney of the plaintiff bank visited Gardner at his home and procured from him the chattel mortgages in question upon substantially all his personal property, to secure the payment of the notes above referred to as well as an overdraft of \$323.69, for which a new note was then made. They also obtained his agreement to convey the land owned by him to a trustee to secure said indebtedness. On the 28th day of the same month, the said R. W. Gardner was adjudged insane by the commissioners of insanity for Washington county, and an order was subsequently entered for his confinement in the state hospital for the insane.

On the 7th day of the following month, he was adjudged by the district court to be of unsound mind, and the defendant Wilbur Gardner was appointed guardian for the preservation of his estate. Later said guardian sold and converted the mortgaged property into money, which by order of the court and consent of the parties has been deposited to be held in lieu of said property and subject to the judgment and decree of the court as shall be found just and equitable. In this action the plaintiff bank seeks to establish its mortgage liens and have the money in the guardian's hands arising from the sale of the mortgaged property applied to the payment of its claim. In defense, the guardian does not attempt to dispute the indebtedness of his ward to the bank, but pleads that the giving of said mortgage, with other transactions occurring at the same time, was in effect a general assignment with preferences, and therefore void. He further alleges, by way of defense, that at the time of making said mortgages R. W. Gardner was insane and incapable of an intelligent comprehension of the acts in which he was engaged, and that plaintiff had knowledge of such fact at the time. Other matters were pleaded by way of defense and counterclaim, but their consideration is not involved in this appeal. Issues were also joined between plaintiff and certain other creditors of the ward; but no appeal has been taken from the decree of the court with respect to them, and we need not cumber this opinion with their statement. The result below seems to have turned upon the issue as to the sanity of R. W. Gardner at the time of making the mortgages, and this was found against plaintiff. If that finding is correct, there is nothing in the decree of which plaintiff can rightfully complain.

Appellant concedes that, very soon after the execution of these mortgages, Gardner "developed some evidences of mental unsoundness," that he was addicted to some extent at least to the use of opium or laudanum and mor-

phine, and that he sometimes indulged in intoxicants to excess. The adjudication of his sanity is not denied; but it is the contention of appellant that up to and including the time of giving said mortgages, and for at least some days thereafter, he was entirely competent to transact business in a rational manner, and was at all said times legally competent to bind himself by contract. In support of this contention, several witnesses, who had known R. W. Gardner more or less intimately and had done business with him in recent years, gave it as their opinion that he was of sound mind. Some of them admitted their knowledge of his use of drugs and intoxicants, and related instances when they had seen him stupefied and overcome from the effects of such indulgences. The testimony most directly in point in plaintiff's behalf is given by its president and attorney, who visited him on October 15, 1907, and procured the security for his indebtedness. They detail with much minuteness his appearance and conduct on that occasion, showing it to be that of a rational and competent person, and express the opinion that he was of sound mind. The president of the bank claims that, until a few days prior to this transaction, he never had any knowledge of Gardner's drug habit, and that the information made him uneasy and was one of the reasons leading him to seek the security. No expert testimony was offered on the part of the plaintiff. On the other hand, the defendants introduced an equal or greater number of neighbors and acquaintances, who also had dealings with Gardner and opportunity to observe his conduct over a considerable period of years, and they unite in the opinion that during all that period there had been a marked but gradual deterioration in the physical and mental quality of the man, and that for the last several years he had been of unsound mind. Two physicians, who had known him well and had attended him or the family of which he was

1. CHATTEL MORTGAGES: mental capacity of mortagor: evidence.

a member, speaking from their personal knowledge and observation of his habits and condition, express with emphasis their opinion that during the month of October, 1907, and for a considerable period prior thereto, R. W. Gardner was of unsound mind and incompetent to transact business.

It appears without material dispute that Gardner had contracted the opium habit as early as 1892, and from that time until he was committed to the hospital for the insane, with a possible interim from 1895 to 1898, the abnormal appetite grew upon him, until during the later years his daily consumption of the opiate in the form of laudanum reached proportions which would seem incredible were the story not vouched for by so many different witnesses whose character for veracity is not impeached. His purchases from a single dealer at different periods are shown to have been at the rate of from 1 to $2\frac{1}{2}$ pints at intervals from three to five days. Two purchases of a pint and a pint and a half, respectively, were made in one day. Another druggist says he sold him in quantities averaging eight ounces at a time about once in three weeks. His traveling companions testify to his purchases and use of other large quantities when away from home. He also drank intoxicants to excess. This course of living and conduct produced its natural result in physical, mental and moral degeneration. From a young man in good health, medium size and weight, he had developed, at early middle age, a weight of near 240 pounds, an increase which the witnesses speak of as "fat" or "bloat." From a more than ordinarily respectful and affectionate son, he came to treat his mother with abuse and contempt. He allowed himself to become in some manner entangled with a woman in Chicago to whom he made frequent contributions in money and provisions. His business was not handled wisely or discreetly. He was forgetful, was frequently seen in a drowsy condition, was nervous and excitable;

subject to hallucinations, saw sights and heard noises not perceptible to others who were with him, was afraid to be alone in the dark, and in many ways gave evidence of his weakened powers. A witness for the plaintiff saw him at one time asleep on the fence at the pens in the Chicago stockyards, and saw him again in Kansas City when he "could neither walk nor talk and was too far gone to speak." Another of plaintiff's witnesses at one time carried him from the field when he was absolutely paralyzed, "did not know anything. I thought he was going to die. The folks said he had taken an overdose of laudanum. He came out of it, and we took him to the house and told Mrs. Gardner to keep him there." He spent much of his time in writing out numerical calculations having no apparent purpose and invested money on the Board of Trade. Appeared to think he was in prosperous business condition when in fact he was hopelessly insolvent. The medical testimony is to the effect that the long-continued use of opium in large quantities tends to produce mental aberration culminating in dementia, though some persons are able to indulge to excess without such results. The opium eater is apt to have illusions. It produces confusion of ideas and loss of will power.

Other facts and circumstances were shown in evidence by the plaintiff and defendants tending in some degree to corroborate their respective theories of Gardner's mental condition; but we can not prolong this opinion to set them forth. Such matters as we have already stated are sufficient to indicate the general trend of the showing made on either side. We have read the record with the care its importance demands, and are abidingly satisfied with the findings of the trial court upon the principal fact in issue. We think it clear beyond all reasonable question that, at the time the mortgages were executed, Gardner was a mental wreck without rational comprehension of

the real nature of his act and without capacity or will power to protect his own interests. The plaintiff parted with no new consideration for the execution of these instruments, and there is, consequently, nothing in the hands of the ward or of his guardian which equity will require him to restore as a condition precedent to his denial of their validity.

It is further urged on the part of the bank that, even if Gardner was of unsound mind, it had no knowledge of the fact, and, the transaction in itself being reasonable and fair, it is enforceable against the ^{a. SAME:} guardian. Without attempting to define the limits of the rule which is here invoked, we have only to say that we think the record fairly shows that the execution of the mortgages was obtained under circumstances which charge the bank with notice of Gardner's mental incompetency. The guardian testifies that before this date he went to the president of the bank, called his attention to Gardner's condition, and told him that he (Gardner) did not know what he was doing. The president denies the latter part of this statement, but admits he was then told of Gardner's bondage to the opium habit, and that this information was what incited him to activity in getting security for the bank's claim. Moreover, if the testimony of a large majority of the witnesses it to be believed, Gardner's general demoralization must have been too patent to escape the notice of men of ordinary observation and experience. The haste manifested in procuring the mortgages and the manner of their procurement also give ample support to the theory that appellant was quite well aware of the real condition of affairs.

It further appears in the record that within a day or two after giving the mortgages Gardner, with plaintiff's consent, sold some of the mortgaged hogs; the money therefor being paid to the bank. The receipt of such

money was pleaded by the guardian as a counterclaim to the plaintiff's action and this, it is urged, operates as a ratification of the mortgages. We can not so regard it. If Gardner was of unsound mind, his act would manifestly not operate as a ratification, and the counterclaim pleaded by the guardian does no more than recognize the fact that the bank has procured a sum of money from the sale of the ward's property and asks proper credit therefor. This we think he may do without in any manner conceding the validity of the mortgages.

The court taxed in favor of plaintiff and against the guardian the ordinary costs which would have attached to a judgment by default, but assessed the costs of the trial upon contested issues to the plaintiff, and upon this error is assigned. The order seems to be right. The entire contest centered around the issue made upon the mental condition of the ward and the validity of the mortgage, and, this being found against the plaintiff, it can not be heard to deny its liability for the costs thus occasioned.

Some point is also made on the fact that the court at first entered judgment for the plaintiff on the original consideration of the promissory notes, but later, during the same term, corrected the entry by giving judgment against the ward for the full amount claimed by plaintiff with interest and attorney's fees as provided for in the notes. If we understand appellant's counsel, they claim to have served their notice of appeal before this correction of the judgment entry was made, and, although the correction gives precisely what plaintiff demanded, so far as the amount of recovery is concerned, we must look alone to the original erroneous entry and reverse the trial court for an error which has been corrected, and then proceed to grant the plaintiff the very relief which has been awarded to it below. The

3. SAME:
counterclaim
by guardian:
admission of
plaintiff's
cause of action.

4. TAXATION OF
COSTS.

5. JUDGMENTS:
correction
of same.

statement of the proposition is its own sufficient answer. If there was any error in the original judgment, it is, in view of the entire record, without prejudice to the plaintiff.

Other questions have been argued, and counsel have to some extent gone into a consideration of the issues joined between the plaintiff and other creditors of R. W.

Gardner, who appeared and resisted its
6. ^{APPEAL; review of particular issues.} claims to a prior lien upon the fund in the guardians' hands; but it is unnecessary to review or pass upon them here. No appeal has been taken by either party from the judgment of the district court with respect to these issues.

The plaintiff does complain because costs were not taxed against these contesting creditors; but we see no reason for interfering with the taxation as made by the
7. ^{TAXATION OF COSTS.} trial court. The plaintiff itself brought these parties into court, and its claim to a preference over them in the distribution of the fund was denied. The substantial issues were determined against its claim, and the costs properly follow.

The rules which govern this case are too elementary to require any discussion of the authorities. The facts alone afford the only ground for debate. We think they are with the defendant, and the decree appealed from must be affirmed. Appellant's motion to strike appellees' amendment to abstract is denied. *Affirmed.*

BERTHA PEITZMAN v. JOHN H. PEITZMAN, Appellant.

Divorce: SUPPORT OF CHILD: ADDITIONAL SUPPORT: CHANGE OF CIRCUMSTANCES: EVIDENCE. A decree of divorce awarding alimony and the custody of a minor child is conclusive of the question of alimony, so long as the circumstances of the divorced party to whom the custody of the minor was awarded remains unchanged; and a supplemental proceeding for additional support of the child

can not be maintained without a showing of change of circumstances requiring the same. The decree in question gave the custody of the child to the wife and required the husband to help support the child by specified monthly payments. In this proceeding for additional support it appears that the wife had become unable on account of illness to contribute as much towards its support as was contemplated when the decree was rendered, that illness of the child necessitated a larger amount for its support, and that the unwarranted conduct of the husband had deprived the wife of a source of her income. *Held*, that such a change in circumstances is shown as to authorize the court to grant additional alimony for the support of the child.

*Appeal from Polk District Court.—Hon. HUGH BRENNAN,
Judge.*

TUESDAY, MARCH 15, 1910.

THIS is a proceeding in equity to secure a modification of a decree of divorce, rendered in favor of plaintiff and against defendant, providing for the payment of alimony to plaintiff at the rate of \$2.50 per month for five years toward the support of a child, the custody of which was awarded to plaintiff. The modification asked was that defendant be required to pay \$20 per month toward the support of said child, and the decree was modified by the court by ordering defendant to pay the plaintiff, for the use and benefit only of said child, the sum of \$10 per month until the further orders of the court. Defendant appeals. *Affirmed.*

Woodin & Ayres, for appellant.

A. D. Pugh, for appellee

McCLAIN, J.—It is well settled under our statutory provisions that, where a decree of divorce has been granted and custody of child awarded to plaintiff with alimony,

VOL. 147 IA.—45.

the decree is final and conclusive as to the alimony to be paid so long as the circumstances remain the same, and a supplemental proceeding for additional support for the child can not be maintained without showing a change of circumstances requiring an additional allowance. See *Ferguson v. Ferguson*, 111 Iowa, 158, and *Crockett v. Crockett*, 132 Iowa, 388, construing and applying Code, section 3180. The only question presented on this appeal is whether the evidence shows such change of circumstances as to justify a modification of the decree.

It appears that in the original decree of divorce the custody of the child was awarded to plaintiff, and defendant was required to pay towards the support of the child \$150 in a lump sum and \$2.50 per month for five years. These provisions were embodied in the decree by the consent of the parties. It appears by the evidence that since the rendition of the original decree plaintiff has become unable, on account of ill health, to contribute as much toward the support of the child as it was contemplated that she would be able to contribute at the time the decree was rendered, that the illness of the child has necessitated a larger amount for its support than was then within the contemplation of the parties, and that by the unwarranted action of the defendant in objecting to the employment of the plaintiff by the Germania Maenner Chor, of which he was a member, so long as she took the child with her, the plaintiff has been deprived of a source of income which she previously enjoyed by giving lunches at the meeting of the society. The source of income just referred to would have continued, as the evidence tends to show, had the defendant not complained to the society of the employment of plaintiff at its social gatherings and picnics, so long as she took the child with her, and it appears that, as plaintiff had no one with whom she could leave the child, who was under seven years of age, she must abandon the employment under that condition. The lunches which

plaintiff was accustomed to provide at the meetings of the society were given by the Ladies Auxiliary, and there is nothing in the record to indicate that the conditions surrounding the giving of these lunches were such as to render it improper for plaintiff to take the child with her on these occasions.

We think the changes of condition shown by the record were such as to justify the action of the court in decreeing the payment of a larger amount per month by defendant to plaintiff for the support of the child, and the decree is affirmed.

SAM MANATT, Appellant, v. C. O. GRIFFITH, ET AL.

Conveyances by husband and wife to each other: DOWER: ESTOPPEL.

1 Where the husband and wife join in the execution of deeds to their property, one to the other, for the purpose of making a division thereof, leaving the name of the grantee blank, but with authority to each to fill in the name of a purchaser and to deliver the same, with the full purpose and intent on the part of both to enable them to dispose of their respective land free from any dower right of the other therein, and without any subsequent action by way of joinder in conveyances thereof, and this mutual understanding had been acted upon and carried out by both parties by completion and delivery of the deeds to purchasers, they are each estopped from thereafter asserting any dower interest in the land conveyed by the other.

Same: STATUTE. The statute which denies to the husband or wife 2 the power to contract with the other in regard to the dower interest which each has in the others property, does not prevent an estoppel from arising out of the subsequent acts of the parties in carrying out and completing an agreement for a relinquishment by each of a dower interest in the property of the other.

Same: WHO MAY PLEAD ESTOPPEL. The completion of a deed executed 3 as above recited by filling in the name of a grantee designated as trustee and delivery of the instrument, the trustee at the same time executing an agreement contemplating a distribution of the property without the necessity of procuring a relinquishment of any contingent interest of the other spouse, and contemplating no compensation to the trustee in carrying out the trust, but obli-

gating him to do so, is supported by a sufficient consideration to authorize the trustee to assert an estoppel of any claim to dower in the property by the other spouse.

Appeal from Washington District Court.—Hon. W. G. Clements, Judge.

TUESDAY, FEBRUARY 15, 1910.

ACTION to quiet plaintiff's title to a one-third undivided interest in certain real property conveyed by his wife, Mary J. Manatt, during her lifetime to defendant Griffith, as trustee for other defendants. The defendants joined in an answer, putting in issue plaintiff's alleged right, title and interest in the property described, and the defendant Griffith, as trustee, in a cross-petition asked that the title to said real property be quieted in him as against any claim of plaintiff. The court denied relief to plaintiff, and sustained the crossbill of defendant Griffith, as trustee. Plaintiff appeals. *Affirmed.*

Wade, Dutcher & Davis and W. H. Butterfield, for appellant.

Eicher & Livingston and M. W. Bailey, for appellee.

McCLAIN, J.—In 1905 this plaintiff and his wife, who had for some years been living apart, entered into an arrangement for a division of property between them, in pursuance of which a joint deed, blank as to consideration and grantee, describing the land to which this controversy relates, was put into the possession of the wife, and similar joint deeds, also blank as to consideration and grantee, describing other parcels of real property, were put into the possession of the plaintiff, the intention of the plaintiff and his wife being to thus enable each party to transfer

the parcels of land described in the respective deeds free from any dower interest of the other. Thereafter the wife, desiring to create a trust for the distribution after her death of the property of which she might die seised, including the land to which this controversy relates, executed a trust contract with defendant Griffith, her son-in-law, in which he undertook to make disposition of her property in accordance with the provisions of such contract, and in connection with the creation of this trust she caused the name of said Griffith, as trustee, to be inserted as grantee in the blank deed to the premises in controversy, which had been left in her possession, and also caused the blank in said deed as to consideration to be filled by a recital relating to the trust arrangement. With the blanks thus filled the wife delivered this deed to said Griffith, and it was by him put on record in connection with the recording of the trust contract. The wife died in 1907. Prior to the death of the wife this plaintiff caused the blanks in the deeds which had been delivered into his possession to be filled with the names of various grantees, and the blanks as to consideration to be filled with various amounts of money consideration, and delivered them to said grantees.

In support of plaintiff's claim that the conveyance, signed by plaintiff and his wife, under which defendant Griffith, as trustee, claims absolute title to the tract of land

i. CONVEYANCES
BY HUSBAND
AND WIFE TO
EACH OTHER:
dower:
estoppel.
described therein, was not effectual as a relinquishment of plaintiff's dower right in said property, treating it as the property of the wife conveyed by her to Griffith during lifetime, counsel contend that under the provisions of Code, section 3154, any conveyance, contract or power of attorney by which husband or wife attempts to authorize the other to release or extinguish the dower interest of the former in the property conveyed by the latter is invalid, and they rely upon the cases of *Miller v. Miller*, 104 Iowa, 186, and *Sawyer v. Biggart*, 114 Iowa, 489, and other cases

holding that an express power of attorney from wife to husband, or husband to wife, as the case may be, does not confer authority to execute an instrument of conveyance extinguishing the dower right of the other. This question, as well as the question of fact whether the land in controversy, which had been the homestead of the husband and wife some years prior to the arrangement made between them, continued to be the husband's homestead at the time when the arrangement was made, and was his homestead at the time when his wife attempted to convey the premises to Griffith, we shall not discuss, for the reason that we think the case may be disposed of on another ground.

It appears, as already stated, that the arrangement between plaintiff and his wife was made with the full purpose and intention on the part of each of them that the parcels of land as to which each received, respectively, blank deeds signed by both should be disposed of by means of the filling in of names of purchasers as grantees, and that on each side this arrangement was carried out, and the deeds which had been executed in blank were delivered to such purchaser, the wife's deed, as already stated, being delivered to Griffith, as trustee, in pursuance of the trust arrangement, and the deeds received by plaintiff being delivered to purchasers for valuable considerations. The understanding between the two, which was no doubt erroneous, was that in this manner each would be enabled to dispose of the property described in the blank deeds free from any dower right of the other, without any subsequent action by way of joinder in conveyance; or otherwise; neither party wishing to be obliged to have the consent of the other to pass a fee simple title free from dower right. This mutual arrangement and understanding was acted upon by each party; the belief of the plaintiff being that he could convey the tracts as to which he held blank deeds free from his wife's dower interest contingent on her surviving him, just as she under-

took to convey the land in controversy free from plaintiff's dower interest contingent on his surviving her. Under these circumstances we are satisfied that each party became estopped, after the blank deeds were filled in and delivered as contemplated, from asserting any dower interest in the land conveyed to the other, and that plaintiff can not now assert as against these defendants a dower interest which as a contingency was released by the mutual agreement, fully acted upon and carried out as already indicated.

On this question the contention for plaintiff is that, as the mutual agreement for the relinquishment of mutual dower interests was contrary to law, it can not afford the

2. SAME: basis for an estoppel. The statute, as construed in the cases already referred to, simply denies to either husband or wife the power to contract with the other in regard to the dower interest which each has in the other's property, and we find nothing in the cases interpreting this statute to indicate that one of the parties may not, by subsequent conduct, become estopped as against the grantee of the other to assert such dower interest. On the contrary, it is well settled that such an estoppel may arise. *Dunlap v. Thomas*, 69 Iowa, 358; *Baldwin v. Hill*, 97 Iowa, 586; *Meylink v. Rhea*, 123 Iowa, 310; *Fowler v. Chadima*, 134 Iowa, 210.

It is true that defendant Griffith, taking the property as trustee only, has not parted with any money in reliance on plaintiff's agreement that the conveyance by his

3. SAME: who may plead estoppel. wife should be free from plaintiff's contingent dower interest; but there is ample consideration in his undertaking to carry out the terms of the trust without compensation, and his obligation to do so has become fixed by the terms of the trust agreement, and irrevocably; for the death of the wife without making other provision for the distribution of her estate has fixed upon him a duty which he can not now escape. It would be plainly against all equitable principles

of estoppel to allow plaintiff, after having the property for which he received deeds, and accepting valuable considerations therefor in pursuance of the mutual understanding between them, and after the death of his wife has relieved the property which he has conveyed from all possibility of being subjected to an assertion of dower on her part, to assert as against this trust estate an interest which it was mutually understood between him and his wife was fully relinquished. The very terms of the trust accepted by Griffith contemplated a distribution of the trust property without the necessity of procuring a relinquishment of any contingent interest of the plaintiff therein, and it can not be said, therefore, that Griffith, as trustee, has not by putting himself in a position to take advantage of the arrangement entered into by plaintiff and his wife become entitled to rely upon estoppel as against plaintiff.

The decree of the trial court is therefore *affirmed*.

THE STATE OF IOWA on the relation of WESLEY GEBRINK
and others, Appellant, v. JOHN W. HOSPERS, County
Attorney, of Sioux County, Iowa, Appellee.

Officers: PROSECUTING ATTORNEY: REMOVAL FROM OFFICE. A prosecuting attorney has some discretion in instituting and conducting criminal prosecutions, and he can not be removed from office for misconduct in that respect without a showing of abuse of such discretion, or a clear showing of corruption or incompetency.

Same: OFFICIAL MISCONDUCT: EVIDENCE. In this proceeding to remove a prosecuting attorney for wilfully neglecting to institute certain prosecutions, the evidence is held insufficient to show official misconduct.

Same: TAXATION OF COSTS. Where it appears that parties instituting proceedings to remove an officer for official misconduct were acting in good faith, the costs, upon dismissal of the proceeding because of insufficient evidence, should not be taxed against the plaintiff but should be assessed as in ordinary state cases.

*Appeal from Sioux District Court.—Hon. DAVID MOULD,
Judge.*

WEDNESDAY, JUNE 15, 1910.

The opinion states the case. *Modified and affirmed.*

G. T. Hatley, for appellants.

Gerrit Klay, for appellee.

WEAVER, J.—This proceeding was instituted upon the relation of five qualified electors of Sioux county for the removal of the defendant from the office of county attorney on the charge that he had willfully neglected the performance of certain official duties, in that the Standard Oil Company, a dealer in gasoline, kerosene and other petroleum products in said county, had sold said products at a higher rate or price in certain localities in said county than in others, such discrimination being made for the unlawful purpose of suppressing and preventing competition in said business by other dealers, and that, upon complaint being made to defendant, he had neglected and refused to prosecute the offenders, or to submit the charge to the consideration of the grand jury. The answer of the defendant denies the charge, and alleges that he did act in the premises with reasonable promptness, and that the grand jury had continued the matter for further consideration. On hearing the testimony, the trial court dismissed the proceedings, and taxed the cost to the plaintiffs, who appeal from said judgment.

An examination of the record convinces us the trial court was right in finding the charge against the defendant was not proven. It is true there is evidence tending to show a violation of the statute by the Standard Oil Company, and that complaint thereof was made to the defendant.

It appears, however, that either upon his initiative or that of some other person the matter was laid before the grand jury, which declined to return an indictment at that time, but continued the subject for further inquiry. This action was probably prompted by the fact that a similar prosecution had been begun in a neighboring county in which proceeding the constitutionality of the statute had been put in issue, and it was thought advisable to await the outcome of that case before further action upon the complaints made by the relators. Whether that conclusion was wise we need not consider, but there is nothing to indicate that it was not made in good faith, or that the result was in any manner subversive of public interests. Just what part defendant had in this postponement is not made clear. He has no control over the grand jury. He can not command the indictment of any person. It not infrequently happens that circumstances attending an alleged offense render it expedient that time be taken to mature a plan of action and to secure and marshal the testimony which will render the prosecution certain and effective. A certain degree of discretion in these respects is confided to the prosecutor, and unless he abuses it or there is a clear showing of corruption, or negligence, or incompetence in the administration of his office, he is not amenable to proceedings for his removal. That remedy is a very drastic one, the effect of which is not only to deprive an individual of an office to which he has been regularly chosen, but also to deprive the people of the services of the man whom they have selected for the position, and it should be exercised only in cases of official wrongdoing established by clear and satisfactory evidence. No such showing has been made in the case at bar, and the judgment dismissing the petition can not be disturbed.

But, after some reflection, we are not fully satisfied that plaintiffs should be taxed with the costs. The proceeding, though prosecuted upon the relation of private

citizens, is essentially one in which the relators stand in a representative capacity. They speak for the public and the law, and the courts take cognizance of their complaints not to remedy their private wrongs, but to conserve public interests. It is a matter of good public policy that citizens instituting such proceedings in good faith, though upon mistaken premises, should not be deterred by personal risks from performing a disagreeable duty, and, so long as they act in good faith, we are of the opinion that the costs should be assessed as is done in ordinary state cases. Such appears to have been the legislative purpose as expressed in the statute. See chapter 78, Laws 33d General Assembly. The showing of want of good faith or want of probable cause does not appear so patent as to call for penalizing the relators with the costs, and the judgment below is modified by setting aside the taxation thereof against them in the court below.

Costs of this court will be taxed to the appellants.
Modified and affirmed.

CLARENCE GREGORY, Appellant, v. CHICAGO, ROCK ISLAND & PAC. Ry. Co.

Railroads: INJURY TO SERVANT: INCOMPETENCY OF FELLOW SERVANT:
I INSTRUCTION. In an action by a servant for personal injury on the ground of negligence of the master in employing and retaining an incompetent fellow servant, the plaintiff must show the employment and incompetency of the fellow servant at the time of the accident and that such incompetency caused the accident; he can not recover by showing negligence in the original employment without showing that the employment and incompetency continued up to the time of the injury. Under this rule an instruction that plaintiff must prove that his injury resulted from the negligence of the master in employing and retaining the fellow servant with knowledge of his incompetency was not erroneous because using the words employing and retaining conjunctively,

This is especially true where the plaintiff by his pleading, in his proof and a requested instruction, treated the defendant's liability as growing out of the negligent employment and retention of the fellow servant.

Same: REQUESTED INSTRUCTIONS. Where the court has given an instruction at the request of a party, using terms conjunctively, he can not thereafter require the court to give an instruction using such terms disjunctively; especially without first asking a withdrawal of the instruction given.

Contributory negligence: EVIDENCE. In an action for injury to a servant evidence of the extent of his service and experience in the work is admissible on the question of contributory negligence; but where it conclusively appeared that the servant was doing the particular work for the first time on the day of his injury, error in excluding evidence of his previous experience in that work was not prejudicial.

Witnesses: EXAMINATION THROUGH AN INTERPRETER. The examination of a witness through an interpreter is largely a matter within the discretion of the trial court. The proper method, however, is for the interpreter to be impersonal, to require that all questions to the witness be in the second person, repeated by the interpreter without remarks of his own, and that the answers be repeated literally by the interpreter in the first person. The interpreter should act as a phonograph.

Appeal: BILL OF EXCEPTIONS: ARGUMENT. It is the privilege of a party to incorporate in a proper bill of exceptions any prejudicial matter not otherwise appearing, and failing to do so he can not state such matter in argument as the basis of complaint.

Appeal from Appanoose District Court.—Hon. M. A. ROBERTS, Judge.

FRIDAY, FEBRUARY 11, 1910.

THIS is an action for personal injuries. There was a trial and a submission of the case to the jury, which rendered a verdict for the defendant. Plaintiff appeals. *Affirmed.*

Howell & Elgin, for appellant.

Carroll Wright, J. L. Parish, and Porter & Greenleaf, for appellee.

EVANS, J.—Some of the undisputed facts in the case are that the plaintiff was employed by the defendant as a common laborer in the city of Chicago on July 19, 1906. He was engaged in service in handling freight at a warehouse of the defendant. At the time of the accident, July 26, 1906, he was assisting in the loading of sacks of sugar out of the warehouse into a car. These sacks of sugar weighed about one hundred lbs. each, and were piled in ranks in the warehouse eight or ten sacks high. They were loaded on the truck in the warehouse, and trucked into the car over a gang plank. The plaintiff and one Stuart were loading the sacks upon a truck, and Yockovitch, a young Austrian, who could not speak English, was handling the truck. The usual method of bringing the sacks down from the upper layers was to take out a sack near the bottom and let those above roll down. During the progress of rolling, the workmen stepped back to avoid the falling sacks. This was what the plaintiff was attempting to do at the time of the accident. As he stepped back, however, to get out of the way, he collided with the truck which was in charge of Yockovitch, and was caught by the falling sacks in such a way that his leg was broken. His charge of negligence against the defendant is that Yockovitch was an incompetent person, and that the defendant was negligent in employing and retaining him. He charges that he was injured wholly through the fault of Yockovitch in bringing the truck up behind him at this particular juncture, and that he himself was free from negligence. Whether Yockovitch was incompetent as a common laborer, and whether he was at fault in the placing of his truck, and whether plaintiff himself was not at fault, are all questions in dispute under the evidence. And they furnished the principal dispute so far as the facts are con-

cerned. The record is not large, but the case is now presented to us upon thirty-four assignments of error, all of which are elaborately argued. We can not notice all these points within the proper limits of an opinion, but we will give our attention to those upon which the appellant seems to place the principal reliance.

I. Counsel for appellant have very properly pointed out to us what they deem to be the most decisive point in the case, and we will give that our first consideration.

x. RAILROADS: **injury to servant; incompetency of felon; low servant: instruction.** In his petition, the plaintiff charged the negligence of the defendant in the following words: "The defendant was negligent in employing and retaining the said Peter Yockovitch, with its knowledge of his incompetency to perform his duties with safety to his coemployees, and the said negligence was the cause of plaintiff's injury." In stating the issues to the jury in its instructions the trial court adopted from the petition the language above quoted. The third instruction, on the subject of burden of proof, charged the jury that the burden was upon the plaintiff to prove "that said injury resulted from negligence on the part of the defendant in employing and retaining said Yockovitch with knowledge of his incompetency." Other instructions also directed the attention of the jury to defendant's alleged negligence in "employing and retaining" said Yockovitch. Appellant's complaint is that this laid upon the plaintiff undue burden, in that it required him to prove both grounds of alleged negligence, whereas it was sufficient if he proved one. The allegation of the petition is that Yockovitch was originally employed only two days before the accident, and the undisputed evidence is that such original employment occurred only a very few days prior to such accident.

The plaintiff himself presented to the court certain requested instructions, which were given by the court as numbers fifteen and sixteen, and were as follows:

(15) Plaintiff claims that defendant's employee Peter Yockovitch was habitually careless, negligent and incompetent in the way in which he did his work in the various ways as pointed out in the evidence, and claims, further, that the defendant's boss, Henry, had actual notice of said habitual negligence and incompetence, and claims further that, even though the said Henry did not receive actual and personal notice of the negligent acts and general incompetence, yet that defendant should be charged with such notice, in that the said negligent acts and incompetence of said Yockovitch were so general and so uniform and habitual that the said boss should have ascertained the same, and that the defendant company was negligent in that it retained said Yockovitch in its service.

(16) You are instructed that it is the duty of the boss, Henry, to not only have general supervision over the men in his employ, but also to exercise ordinary care in inspecting their work, to the end that he might ascertain whether said employees were competent and careful men in their work, or whether or not they were habitually negligent and incompetent, because the law imposes the duty upon the defendant company to exercise ordinary care in the securing and retaining of none but competent, careful men. Now, if you find that the employee Peter Yockovitch was incompetent, and habitually careless in his work, and that the said boss, Henry, had personal knowledge of said fact from direct notice, or otherwise, or that said negligence and incompetence were so apparent, continual and habitual as that the defendant should have learned the same by the exercise of ordinary care prior to the accident, then, and in either of said events, you are instructed that the defendant would be negligent; and, if you further find that the negligence of said incompetent and negligent servant caused the plaintiff's injury, and further find by a preponderance of the evidence that the plaintiff himself did not contribute to his injury by his own negligence, your recovery will be for the plaintiff.

It is urged by appellant that the words "employing" and "retaining" should not have been stated conjunctively, but that they should have been stated disjunctively. This argument proceeds upon the theory that the word "employ"

has reference to the initial hiring as distinguished from the retention in service. He claims that it was enough for plaintiff to prove that the defendant "employed or retained" Yockovitch, on the theory that the two acts are separate and distinct. If, however, these words are to be distinguished and separated so as to cover two distinct acts, it would be manifestly incorrect for the court to instruct in the form contended for by the plaintiff. Such an instruction would permit the plaintiff to recover by showing the initial negligent employment of an incompetent, without showing that such employment and incompetency continued up to the time of the accident. Manifestly the only material question at this point was whether Yockovitch was an employee of the defendant at the time of the accident, and therefore whether the defendant had "retained" him in its employ up to that point with knowledge of his alleged incompetency. In a given case the original employment might have been in the long past. The fact that an employee was incompetent at the time of such original hiring would not be sufficient to furnish a basis of complaint to the plaintiff. But if the defendant retained the employee and if the incompetence of the employee continued down to the time of the accident, these are the facts which would concern the plaintiff. An employee incompetent when originally hired, does not necessarily continue incompetent.

As an abstract proposition, therefore, if the plaintiff is entitled to separate the words "employ" and "retain," as referring to separate acts and separate points of time, it is not correct to say that he could recover upon proof of either alleged ground of negligence. It would be theoretically necessary for him to prove that the employment and the incompetency existed at the time of the accident and that such incompetency was the cause of the accident. But we have no occasion in this case to analyze

this expression so critically. It is manifest that the plaintiff in his petition, and in the requested instruction number sixteen, used the words synonymously and as descriptive of a continuous act of the defendant, namely, the retaining of Yockovitch in its employ with knowledge of his incompetency. The petition showed the original hiring and the retaining to be practically simultaneous. The evidence was to the same effect.

After the court had read his instructions to the jury, including instructions fifteen and sixteen, requested by the plaintiff, the plaintiff presented and requested the following

<sup>a. SAME:
requested
instructions.</sup> instruction: "The plaintiff claims two things in regard to the defendant's negligence: First, that the defendant company was negligent in employing Peter Yockovitch; . . . or, second, that said company was negligent in retaining him in their employ after he had been employed. That is, that defendant was negligent in employing said Yockovitch 'or' in retaining him in the company's service." The court refused this instruction, and the appellant assigns error thereon. Appellant has no ground of complaint, and for several reasons. The proposed instruction only purports to state the "claim" of the plaintiff. The court had already stated the issues precisely in accord with the petition. In so far as the proposed instruction attempted to state the grounds of negligence disjunctively, it was erroneous, as already indicated, in that the first alleged ground of negligence stated, when separated from the second, furnished the plaintiff no basis for recovery whatever. Further, the plaintiff had already used these terms conjunctively in his requested instructions fifteen and sixteen, which had been read to the jury, and he was not entitled as a matter of right to change front. If his theory is correct, the proposed instruction was inconsistent with instructions fifteen and sixteen, which had been given at his request, and he did not ask

to withdraw these. There is the further consideration that the fact of employment of Yockovitch by the defendant and of retaining him appears without dispute in the testimony on both sides. There was no possibility that the jury could find in the negative as to either fact, if they are to be deemed separate facts. The distinction, therefore, urged by the plaintiff, presented nothing substantial for the consideration of the jury, and the argument now presents nothing for our consideration but a play upon words.

II. One Stuart was the first witness for the plaintiff. He was working with plaintiff at the time of the accident, and had known him for some years. On direct examination he was asked to state what previous experience the plaintiff had had in that work. This question was ruled out, upon objection by the defendant, and the appellant complains of the ruling.

3. CONTRIBUTORY NEGLIGENCE: evidence: prejudice. As bearing upon the question of contributory negligence, it was proper for the plaintiff to show the extent of his experience in the work, and the question was proper, and an answer should have been permitted. Later, however, the witness was permitted to state that the plaintiff was doing this particular work for the first time on that day. The plaintiff himself and his father testified as witnesses, and both testified that the plaintiff had never had any previous experience, but had worked on the farm up to the time of his employment by the defendant. This fact was in no manner challenged by the defendant, either directly or by implication, and the erroneous ruling here indicated was clearly nonprejudicial.

III. Yockovitch was a witness for the defendant. He testified through an interpreter, and there is considerable confusion in his testimony. Appellant complains that the court permitted the interpreter "to hold extended conversations with the alleged feeble-minded witness, thereby

robbing the plaintiff of the force and effect of his imbecilic answers to the simplest questions."

4. **WITNESSES:**
examination
through an
interpreter.

The method adopted for the examination of this witness was that the attorneys directed their question to the interpreter, address-

ing him in the second person, and directed him to put the question to the witness, referring to the witness in the third person. After the witness had answered, the interpreter was asked to state what he said. The result of this method of examination was that the language of the witness was repeated by indirect quotation in the third person, instead of by direct quotation in the first person, and it makes a confusing record. Counsel for appellant seems to have contributed his full share toward the confusion by addressing questions repeatedly to the interpreter during the direct examination by defendant's counsel. The following is illustrative of these interjections by plaintiff's counsel, and the answers of the interpreter thereto: "Howell—Q. What did he say? What was he saying all that time? Interpreter—A. Yes, sir; he said it was the truck he was using. Howell—Q. He was not talking all that time just to make that answer, was he? I submit to the court that we are entitled to what the witness said. Q. What was it he said? Interpreter—A. I had to explain what I wanted. Howell—Q. What did he say then? What was it he said to you? Interpreter—A. He just asked me what I meant." At this point the trial court enjoined the "use of some common-sense in this matter." We can not say that this remark was erroneous or inappropriate. There is no hard and fast rule as to the method by which a witness shall be examined through an interpreter. It is necessarily a difficult and unsatisfactory proceeding, and the method of conducting it must be left to the sound discretion of the court in view of all the circumstances. In our view the ideal way to examine a witness through an interpreter is

to require the interpreter to be impersonal, and to require the attorneys to address no question nor remark to the interpreter. On the contrary, all questions should be direct to the witness in the second person. These questions should be repeated by the interpreter without any remarks of his own. The answer of the witness should be repeated literally by the interpreter in the first person, without any remarks of his own. That is to say, the interpreter should be a phonograph for the time being. This method, when followed, results in least confusion in the record. But it is often quite impracticable to enforce it. Some interpreters find it impossible to suspend their personality, and they talk of the witness in the third person. The attorneys often forgetfully address their questions to the interpreter, and then ask him what the witness said. It is a time when the "common sense" enjoined by the trial court is a great *desideratum*, and it needs to be well distributed and reasonably active in order to obtain the best results.

From the broken and confused character of this record at this point we can well believe that the court reporter found himself helpless to record everything that was said.

s. APPEAL: bill of exceptions: argument. The complaint and argument of the appellant are based upon assumptions which are

not supported by the record. That is to say, the matters complained of do not appear in this record. It was the privilege of plaintiff to have incorporated, by proper bill of exceptions duly presented to the court and signed by him, any prejudicial matter which did not otherwise appear. Having failed to do so, he is in no position to state matters in his argument as a basis of complaint which do not appear in the record proper. The record as made discloses no ground of complaint to the plaintiff.

Other alleged errors are argued. We can not discuss them all. A large number of them relate to evidence and

instructions regarding the measure of damages. In view of the finding of nonliability by the jury, we can have no occasion to consider these. We have given careful consideration to all the alleged errors argued, and find nothing that would entitle the plaintiff to a reversal.

The record is not wholly free from technical errors, but such as we note are clearly nonprejudicial.

The judgment of the lower court must, therefore, be *affirmed*.

In the Matter of the Will of HENRY VAN HOUTEN,
deceased.

Wills: CONTEST: REVIEW ON APPEAL. Where it is contended on appeal by the proponents of a will that a verdict should have been directed in their favor, as against a contention of incapacity on the part of the grantor, the court will assume the truth of contestant's evidence.

Same. Where both the questions of mental competency and undue influence in the execution of a will are submitted to the jury and both are determined affirmatively, the fact that the finding upon one of the issues was without support in the evidence will not entitle the proponent to a reversal, if there was evidence on which the other finding can be upheld.

Evidence: TRANSACTIONS WITH A DECEDENT. The contestant of a will and heir of the testator is incompetent to testify to a transaction between the testator and a third party and the conversation relating thereto, where it appeared that the witness was present at the suggestion of the third party to attend to and look after the interests of the testator, and he in fact transacted the business in question for him.

Same: SUFFICIENCY OF OFFER: REVIEW OF RULING. Where it appeared in the abstract that the proponents of a will identified and offered separately the notice, petition and answer in a proceeding by one of contestants for the appointment of a guardian of testator's estate on the ground of his mental incapacity, and it also appeared that the record of the proceedings, among which was a judgment dismissing the petition on the merits, was offered, there was a sufficient showing of an offer of the judgment to authorize a review of the ruling excluding it.

Wills: CONTEST: MENTAL CAPACITY: EVIDENCE. A judgment dismissing proceedings for the appointment of a guardian of the estate of a testator, instituted on the ground of mental incompetency, is admissible as bearing upon his mental condition at the time of his subsequent execution of a will.

Appeal from Mahaska District Court.—W. G. CLEMENTS, Judge.

WEDNESDAY, FEBRUARY 16, 1910.

PROCEEDINGS for probate of will. Contest by certain heirs who were dissatisfied with the distribution of the property provided for in said instrument. Verdict and judgment for contestants and proponents appeal.—*Reversed.*

Hayes & Amos and George G. Gaass, for appellants.

S. A. Reynolds, John N. McCoy, and F. H. Peterson, for appellees.

WEAVER, J.—The objections to the probate of the will are based upon the alleged mental incompetency of the testator and undue influence under which it was executed. Henry Van Houten was a native of Holland, who emigrated to this country after arriving at years of maturity. He was well educated, had been a teacher, and until he came to this country and settled in Iowa had not been engaged in farming. He was born in the year 1812, and was twice married. By his first marriage he had several children. His second wife was a widow and brought to the family several children of her first marriage and one child born to her and deceased survives. After tarrying awhile in the Eastern states deceased came to Iowa in 1853, and founded a home in a Dutch settlement in the central part of the state. Here he resided until his death at the advanced age of about ninety-six years.

He acquired a farm of some three hundred to four hundred acres, which was paid for, and he enjoyed a fair degree of comfort and prosperity. Not being reared as a farmer, he did very little of the actual work of cultivating and improving his land, but for many years relied very largely upon his children and stepchildren, most of whom continued in the family, assisting in working and caring for the farm, for several years after reaching their majority. In time, however, all the children, save a daughter who remained with him till the end of his life, went out to their own homes, or in pursuit of their own enterprises. Among the children of the first marriage were two sons Elko and William, who with one sister are the contestants herein. The two sons named, having gone into business on their own account, met with reverses, and their father was compelled to pay debts to a considerable amount contracted by them, and on which he was liable as their surety. After this occurrence the relations between father and sons became for a time at least unpleasant, and he was wont to refer to his financial loss on their account with bitterness. With advancing years he became to some extent debilitated, physically, and, as contestants claim, mentally as well. In 1904, or perhaps a year or two prior to that date, he called upon Mr. Neyenesch, an old friend and fellow countryman, to prepare his will. Mr. Neyenesch drew the will, as he says, according to the direction and dictation of Van Houten, and it was then duly executed by him. By this instrument he gave to his son Elko the sum of \$1 only. To his minor grandson, a son of William, he gave a half interest in fifty acres of land, and certain books, but made no provision for William, except the use of the property given the grandson until the latter should reach his majority. The bulk of the remainder of his estate, both real and personal, he gave to Syke Van Houten, the daughter who had remained with him and cared for him. On January 20, 1906, he called Mr. Neyenesch to his

home, and procured him to prepare a new will, which was executed, and the first instrument destroyed. The principal change made by the later will in the disposition of his estate was the withdrawal of a small bequest made to his daughter Neeltje Van der Tunk, living in Holland. As to his sons Elko and William, the second will was a copy or repetition of the first. In 1908, two and one-half years after the execution of the second will, and four years at least after the date of the first one, William Van Houten filed petition in the district court, alleging that his father Henry Van Houten was of unsound mind and incompetent to manage and care for his property, and was wasting the same, for which reasons he asked the court to appoint a guardian to care for and preserve the estate. The deceased appeared to this proceeding, and joined issue upon the allegation of the petition, and alleged his perfect competency to manage and control his own property and business. The cause was tried to the court, which found the allegations of the petition had not been sustained, and entered judgment for the defendant. Among other things put in evidence upon said trial was the deposition of Henry Van Houten, which has been introduced into the present record.

The foregoing statement of some of the salient features of the history of this controversy has seemed necessary in order to make entirely clear the point and bearing of appellant's exceptions to certain rulings of the trial court. As has already been stated, the contestants allege, first, that at the date of the will the testator was of unsound mind, and without testamentary capacity; and, second, that the execution of the will was procured by undue influence exercised by the daughter Syke Van Houten and others. The jury found for the contestants on both propositions.

I. It is contended for the appellants that there is no evidence upon which the finding against the testa-

mentary capacity of the deceased can be sustained, and that the court should have directed a verdict thereon in favor of the proponents. As a new trial must be awarded for reasons hereinafter stated, it is proper that we refrain from any discussion of the evidence further than to say that, while the testator is shown to have been a man of much more than ordinary intelligence, and appears to have retained his faculties in a remarkable degree to an age beyond the years allotted to an average person, yet if we assume the truth of all the evidence offered in support of the contestant's claims (and we must so assume in considering whether a verdict should have been directed), we can not say as a matter of law that it did not present a question of fact for the jury.

II. A careful examination of the record discloses an entire absence of evidence on which to base a finding of undue influence, and in our judgment this question should have been withdrawn from the jury.

2. SAME. But the court is committed to the rule that, where the questions of mental incompetency and undue influence are both submitted to the jury, and both are determined affirmatively, the fact that the finding upon one of them is without support in the evidence does not entitle the proponent to a reversal if there is evidence on which the other finding can be upheld. *Will of Sellick*, 125 Iowa, 680; *Bett's Estate*, 113 Iowa, 115; *Wharton's Estate*, 132 Iowa, 716. If the question were one of first impression, the writer would be strongly inclined to the opposite conclusion, and to hold that manifest error in the submission of either question, and particularly where the finding of the jury thereon is also manifestly erroneous, is ground for reversal; but the rule as stated has been too often followed to be now discarded without introducing unfortunate confusion in our decisions.

III. The contestant William Van Houten as a witness in his own behalf was permitted, over the objection

to his competency, to testify to a transaction in which his father in the year 1905 gave or renewed a promissory note to one Tilma, and to detail the conversation had and other incidents of that occasion. It is the claim of the appellants that this witness took part or participated in the transaction referred to, and was therefore incompetent to testify concerning it. Under the record presented we think the objection should have been sustained. According to the showing of the witness himself he was there at the suggestion of Tilma to see that "everything was done straight," or, as we understand the expression, to protect the interests of his father, and see that no advantage was taken of him. He further says there was no one there but himself to act for his father, and that he filled out the note for his father's signature. That he may have done it at the request or suggestion of Tilma instead of his father is immaterial. He was a factor in that transaction, and clearly within the prohibition of the statute.

IV. The proponents offered in evidence the original notice, petition, answer and judgment in the proceedings to which we have above referred as having been instituted by William Van Houten to have his father adjudged mentally incompetent to care for his estate and to appoint a guardian for that purpose. The court sustained the contestants' objection to the offer, but after the case had been closed, and before it had been submitted to the jury, changed the ruling in part, and admitted in evidence the original notice, petition and answer. Error is assigned upon the exclusion from the jury of the judgment dismissing said proceedings. Appellees contend that the record does not show any offer of the judgment in evidence, but we think it sufficiently appears. It is shown by the abstract, and not denied, that the proponents identified and offered separately the notice, the petition, and the

4. SAME:
sufficiency
of offer:
review of
ruling.

answer. It is also shown that the record book was produced, the record of the proceedings in said case was also offered, and that among such proceedings is a judgment dismissing the petition on the merits. To hold with appellee that this does not show a sufficient offer of the evidence to permit a review of the ruling excluding it would be to demand a technical precision to which very few abstracts submitted to this court ever attain.

We have therefore to consider whether the judgment in testator's favor in 1908, upon the question of his mental incompetency was competent and admissible in evidence

s. WILLS: con-
test: mental
capacity:
evidence. . as to his mental condition in 1906 at the date
of the will in controversy. From the fact
that sanity or insanity exists at a given time

it does not necessarily follow that the same condition existed at a date two years earlier, though in certain forms of mental unsoundness inferences may be drawn as to the period of its development and the probability or improbability of its continuance. In this case, if the testator's mind was unsound at the date of the will, it is entirely certain that such unsoundness was of the kind usually called "senile dementia" or senile decay, a decay of mental powers resulting from old age. It is progressive and incurable. While the process of deterioration may sometimes be delayed, the ground lost is never recovered. There are no periods of convalescence, no lucid intervals, and when once a condition of incompetency is reached, it is, in the very nature of the case, permanent. It follows inevitably that if the proponents of a will made in 1906 can establish to the satisfaction of the jury that the testator was mentally competent to transact business in 1908, he was not a senile incompetent at the date of the will made in 1906, and if judgment in the guardianship proceedings has any probative force or value on that proposition, its offer in evidence should have been sustained. The question is one which has been quite frequently considered in other states, but

so far as we have been able to discover has never been directly ruled upon by this court.

In the *Fenton Case*, 97 Iowa, 195, the point was raised, but the decision thereof was expressly reserved. It is manifest that such record can not be admitted as evidence of a former adjudication in the ordinary sense of that term. It is more nearly like a finding in a proceeding *in rem* where, as a matter of public interest and right, and for his own protection, the mental competency of an individual is determined. If a person be insane, and thereby a menace to public safety, or, if not violent or dangerous, yet so mentally unsound that he is liable to waste his estate and become a public charge, the law provides methods by which the rights and interests of the public and of the insane person himself may be preserved and protected. If it be thought desirable that he be restrained of his liberty or committed to a hospital for treatment, complaint may be laid before the commissioners of insanity of his county, and upon hearing the truth may be judicially determined and proper orders made. But if personal restraint be thought not necessary, he may be summoned into court, and if the charge of insanity is sustained, a guardian will be appointed and authorized to take charge and control of his property. In neither case is the proceeding an adversary one in the same sense that the plaintiff seeks or can be granted any relief against the defendant. While such plaintiff may be a prospective heir or a creditor, and by such proceedings hope to indirectly benefit himself, yet it is not in such capacity or right that he is permitted to institute the proceedings. Any citizen of the jurisdiction has a right to bring it, and in so doing he represents the public. If the defendant be adjudged mentally incompetent, and a guardian be appointed, every person—or at least every person within that jurisdiction—is held to take notice of it, and persons thereafter dealing with the one under guardianship do so at their peril. In New York and some

other states all contracts made with a person under guardianship are held absolutely void, even though made with strangers having no actual knowledge of the ward's mental incapacity. *L'Amoreux v. Crosby*, 2 Paige (N. Y.) 422, (22 Am. Dec. 655); *Wadsworth v. Sharpsteen*, 8 N. Y. 388 (59 Am. Dec. 499), and even as to contracts made before lunacy proceedings are instituted, if the finding is to the effect that mental incompetency has existed from a time anterior to the making of such contracts, the inquisition is held to be *prima facie* evidence of incapacity at such date. But the presumption, whether conclusive or rebuttable, "extends to all the world, and includes all persons, whether they have notice of the inquisition or not." *Hughes v. Jones*, 116 N. Y. 67 (22 N. E. 446, 5 L. R. A. 637, 15 Am. St. Rep. 386); *Hart v. Deamer*, 6 Wend. (N. Y.) 497; *Osterhout v. Shoemaker*, 3 Hill (N. Y.) 513; 1 Greenl. Evidence, section 556. In most jurisdictions the rule is somewhat less rigid than in New York, but it is everywhere held with almost entire unanimity that such finding, whether of soundness or unsoundness, is at least *prima facie* evidence of the fact so found. See 17 Am. & Eng. Ency. Law (2d Ed.) 606; 7 Ency. of Evidence, 477.

Speaking to this point, Mr. Wigmore says: "There is not, and never has been, any doubt as to the admissibility of an inquisition of lunacy in any litigation whatever to prove the person's mental condition at the time. The only controversy has been whether it is conclusive." 3 Wigmore's Evidence, section 1671. Treating of the same subject, another author says: "An adjudication of insanity will stand thenceforward until reversed as proof of the fact, and the burden of proof will shift to the party alleging sanity. So if the finding of the former tribunal established the sanity of the party, it seems that finding, while not conclusive of sanity, is competent evidence to prove it." Buswell on Insanity, section 194. To say that the finding of the court that the defendant is sane is of no force or

effect, except as against the person entering the complaint, would give rise to grossest injustice. If such were the rule, on the very day he is found sane in an action brought by A., he may be subjected to a second action by B., and so on indefinitely until he is exhausted in both mind and estate, or a dozen such proceedings might be pending against him at the same time, and none be subject to a plea in abatement on the ground of another action pending. Surely such can not be the intent of the law and an adjudication once had in an action regularly brought and prosecuted must be given some force and effect against the world at large, and it is well within the bounds of reason and precedent to say that it affords at least *prima facie* proof of his status as there found. *Den v. Clark*, 10 N. J. Law, 217 (18 Am. Dec. 417). It follows that the record of the adjudication in the guardianship proceedings should have been admitted in evidence.

Other questions argued are not likely to arise on another trial, and need not be further considered.

For the reasons stated, the judgment of the district court is reversed, and cause remanded for further proceedings not inconsistent with the foregoing opinion. Costs of this court will be taxed to the contestants.

Reversed.

AUGUST H. W. RUEBER, Appellee, v. FRANK NEGLES,
Appellant.

Contracts: ORAL MODIFICATION: EVIDENCE: STATUTE OF FRAUDS. The statute of frauds does not forbid an oral contract or proof of the same, it only forbids oral evidence of a contract which is within its provisions. So that where the plaintiff pleads an oral modification of a written contract concerning which no material issue is raised by the answer, and the real question presented is, which of the parties breached the oral contract, the statute of frauds has no application.

Same. An oral contract for the sale of crops not in existence is
2 valid and provable by parol, and any subsequent modification may
be so proven.

Verdict: INADEQUACY: CORRECTION BY THE COURT: NEW TRIAL. Where
3 the jury is instructed to return a verdict for plaintiff in a speci-
fied sum, or nothing, but the verdict is in fact rendered for a
less sum than directed, the court has authority simply to set the
verdict aside subject to the condition that defendant submit to
the larger verdict or to a new trial; a verdict for a less sum than
that authorized can not be corrected by the court arbitrarily.

Same: NEW TRIAL. Where there is evidence to sustain the verdict
4 in the amount rendered the fact that a larger verdict might have
been found under the evidence is not ground for a new trial.

Same: APPEAL: ENTRY OF JUDGMENT. Where there was no error entit-
5 ling defendant to a new trial the action of the court in increasing
the amount of the verdict will not authorize a new trial, but the
appellate court may remand the case with direction to enter judg-
ment on the verdict as returned by the jury, the appellee not
asking for a new trial.

*Appeal from Ida District Court.—Hon. F. M. Powers,
Judge.*

THURSDAY, JUNE 16, 1910.

ACTION for damages for breach of contract. There
was a verdict for the plaintiff for \$133.50. On motion
of the plaintiff, the trial court raised the verdict to \$749
and entered judgment for such amount on the theory
that the plaintiff was entitled to recover such sum or
nothing. The defendant moved for a new trial which
motion was overruled. The defendant appeals. *Reversed
and remanded.*

Johnston Bros., for appellant.

W. A. Helsell, for appellee.

EVANS, J.—The original negotiations between the

parties resulted in a written contract entered into on April 13, 1905, as follows:

Odebolt, Iowa, April 13, '05. This agreement made this day between Aug. H. W. Reuber, of Odebolt, Iowa, and Frank Negles, of Arthur, Iowa, witnesseth: That said Negles has sold his 1904 and 1905 crops of popcorn to said Reuber. Said Negles agrees to deliver his 1904 crop on or before September 15, 1905, in good marketable condition, shelled, at \$1.20 per hundred pounds in elevator at Arthur, free from mould, in popping condition, and agrees to deliver his 1905 crop in good marketable condition any time after November 15, 1905, in crib at Odebolt unless crib can be secured at Arthur, in which case said Negles will deliver his popcorn at Arthur, Iowa. Said Reuber agrees to pay for crop of 1904 at rate of \$1.20 per hundred pounds and seventy-five cents per hundred pounds for 1905 crop at time of delivery, and also agrees to pay said Negles as part payment in July, 1905, \$300.00. [Signed] Frank Negles. Aug. H. W. Reuber.

At the time this contract was entered into, defendant's 1904 crop was in his crib and the 1905 crop was yet to be planted. On the 8th day of June, 1905, this contract was orally modified to the extent that, in lieu of \$300 to be paid in July to Negles, the sum of \$75 should be paid in June, and such sum was then and there paid and accepted on the 8th day of June. In August, 1905, the 1904 corn was delivered and paid for; the previous payment of \$75 being applied on such purchase price. At that time further oral modification was agreed upon to the extent that the delivery of 1905 should be delayed until the summer of 1906. In November, 1905, this latter oral modification was further modified to this extent, that the defendant should then forthwith deliver about 22,000 pounds of corn in crib at Arthur, Iowa; this amount being a surplus for which the defendant had not sufficient crib room. This quantity was received by the plaintiff and paid for. Upon the delivery of this quantity of corn a further

oral modification was agreed upon between the parties to this extent, that the 1905 corn to be delivered in the summer of 1906 should be delivered shelled instead of on the cob and in the crib, and that its price as shelled should be \$1.25 per hundred, instead of \$.75 per hundred on the cob. To this extent, there is no dispute between the parties as to the terms of the modification. Certain points of dispute between them as to such terms will be noticed later on. On May 15, 1906, defendant notified the plaintiff that the corn was in popping condition and he desired to shell and deliver the same. The plaintiff agreed to come out and examine it, and he did come out and examine same on May 29th. He did not see defendant that day, the defendant being absent on a trip; but he left word with the defendant's son that he might deliver the corn. The defendant returned home on June 15th, and on that day received through his son the message from plaintiff. Thereupon he went to plaintiff on June 16th and offered to shell and deliver the corn forthwith. At this time the plaintiff was not willing to take an immediate delivery of the corn on the alleged ground that it was not in popping condition. The final word of this day's conversation, according to the defendant, was: "I told him if he didn't take the corn I will sell it to somebody else." At this time the corn was worth on the market from \$1.25 to \$1.40 per hundred. The defendant did thereupon enter into some negotiations with another dealer, but consummated no contract. On the 30th day of June, the plaintiff made a formal demand for the corn which was refused by the defendant. The testimony of the plaintiff at this point is that on this day the defendant first agreed to comply with the demand and afterwards refused. The testimony of the defendant is that he did not on this day agree to deliver, but immediately refused. At or about this time, the corn was worth \$2.10 on the market. On July 2d defendant sold to another his entire crop, consisting of 81,720 pounds, for \$2.10 per hundred.

I. Appellant contends that the contract between the parties was one within the statute of frauds, and was therefore required to be in writing; that any alleged oral modification thereof converted it into a parol contract; and that no oral evidence was admissible in favor of plaintiff as a basis for affirmative relief. This point was urged in the form of objections to evidence offered on behalf of plaintiff, and the same question is presented here. On behalf of plaintiff, it is urged that the question thus argued by the defendant does not arise upon this record, and we think the plaintiff must be sustained in this contention. It is conceded and pleaded by both parties that there was an oral modification of such written contract. Each party sets out in his pleading the terms of the alleged oral modification. The defendant in his answer sets out such oral modification as follows:

Avers the facts to be that some time in August, 1905, by mutual consent between the parties hereto, said written contract was abandoned and set aside, and it was then and there orally agreed by and between the parties hereto that plaintiff was to purchase of the defendant his 1905 crop of popcorn. That the same was to be delivered by this defendant at Arthur, Iowa (as soon as the same was in popping condition, for which the plaintiff was to pay defendant \$1.25 per hundred pounds shelled corn. That in May, 1906, said corn being in popping condition, this defendant tendered the same to plaintiff, and plaintiff failed and refused to accept or to pay for the same. And again in June, 1906, this defendant again tendered said corn to the plaintiff, and this plaintiff refused to accept the same or to pay for the same.

These averments are precisely the same as the averments of the plaintiff in his petition, except that the plaintiff avers that the time of delivery in the summer of 1906 was to be at his option; whereas, the defendant avers that such delivery was to be made when the corn was in "pop-

1. CONTRACTS:
oral modification: evidence:
statute of
frauds.

ping condition." Under the evidence this difference in the pleadings has become quite immaterial. Under the undisputed testimony the plaintiff exercised his option, if any he had, on May 29th, and at that time directed a delivery. The only difference in the testimony of the two parties at this point is that the plaintiff contends that he directed such delivery at that time provided the corn was in good popping condition. He also testified as a witness that he ascertained from subsequent tests that it was not in good popping condition. The contention of the defendant as a witness was that it was in good popping condition at that time. After May 29th, therefore, the issue between the parties was confessedly narrowed down to the question whether the corn was in popping condition. If it was, the defendant had a right to deliver the same forthwith according to the terms of the oral contract as he claimed it, and he had the same right to deliver it according to the terms of plaintiff's direction in the exercise of his alleged option on May 29th, as testified to by the plaintiff.

Our statute of frauds is a statute of evidence. It does not forbid an oral contract nor render an alleged oral contract void or invalid. It only forbids oral evidence of a contract which is within its provisions. It permits the plaintiff to call his adversary as a witness and to establish the alleged contract by his oral evidence if he can. In this case the pleading of the defendant made no issue as to the terms of the oral modification pleaded except at one point already indicated and which we hold to be immaterial. The vital issue made by the parties under their pleadings was: Which of them was guilty of breaching the contract? Oral evidence on this question is not covered by the statute of frauds. The evidence on behalf of defendant tended to show that the plaintiff was himself guilty of a breach of the contract by his verbal refusal on June 16th to receive an immediate delivery. If the plaintiff was justified in this refusal, then the evidence

of the defendant tended to show a breach of the contract on his own part on that date in his announcement of purpose to sell to another because of the plaintiff's refusal. Substantially the only issue submitted to the jury by the trial court was the question of which party was guilty of the breach, although the attention of the jury was not directed on this question to the particular date, June 16th.

Defendant requested the following instruction (No. 5): "If you find that defendant has established, by a preponderance of the evidence, that the contract in controversy was as claimed by defendant, to wit, that the corn should be accepted by the plaintiff as soon as the same was dry and in popping condition, and you should further find that said corn was dry and in popping condition on the 16th day of June, 1906, and that the defendant tendered the corn to plaintiff and he refused to accept the same, then you are told, as a matter of law, that the plaintiff can not recover and your verdict must be for the defendant." And this was given by the court in substance under the same number.

There is the further consideration that there were four successive oral modifications and that performance or part performance was had in pursuance of the first three. If by reason of these oral modifications the con-

a. SAME. tract between the parties became parol as a matter of law, then it became such parol contract on June 8, 1905. At that time the crop of 1905 was not in existence, and an oral contract with reference thereto was valid and provable by oral evidence according to section 4626 of the Code. We do not see how the subsequent modifications could change the contract in respect to the parol character thus acquired on June 8th, nor change the relation which it sustained to the statute of frauds.

Without passing at all, therefore, nor intimating any opinion as to the legal merits of the point here raised by appellant, we are well satisfied that the argument is not available to him upon this record.

II. As already indicated, the verdict was for \$133.50. The plaintiff filed a motion that the verdict be "corrected," and that \$749 be inserted as the amount thereof, in lieu

of the amount inserted by the jury. This motion the court sustained and in form corrected the verdict and entered a judgment for \$749. This was done manifestly upon the theory that, if the jury found for the plaintiff at all, it could not be for less than the larger sum named. In so changing the verdict, the trial court manifestly erred. If it were true on the record that the verdict should have been for \$749 or nothing, even then the trial court would be warranted only in setting aside the verdict and granting a new trial.

3. **VERDICT:**

inadequacy:
correction by
the court:
new trial.

It is argued by appellee at this point that the trial court would have been justified in instructing the jury that, if they found for the plaintiff, it must be for \$749 and no less, and that if, in the face of such instruction, the jury had rendered a verdict for \$133.50, such verdict would be in plain disregard of the instructions, and the court would therefore be justified in ignoring the lesser sum found by the jury, and inserting the larger amount stated in the instructions. The argument is not supported by our previous decisions, nor is it sound in principle. Even if the court had instructed the jury to return a verdict for plaintiff for \$749 or nothing, and if the verdict actually returned by the jury for \$133.50 had been rendered in the face of such instruction, even then the court could only set the verdict aside, except that it might impose a condition upon the defendant that he submit to the larger judgment or submit to a new trial. This is the utmost extent to which we have ever gone in such cases. It is argued that a finding in favor of the plaintiff for any sum is equivalent to a special finding that he was entitled to recover, and that, where the amount of his recovery was a mere matter of computation under the law, the court might state such amount in its instructions; and, if so, that it might equally

insert the amount in the verdict after its return if the jury ignored such instruction. But if a jury were instructed to return a verdict for \$749 or nothing, and if in the face of such instructions it returned a verdict for \$133.50, it could as well be argued that the refusal of a jury to allow \$749 was equivalent to a special finding that he was not entitled to recovery at all. So that a verdict for the plaintiff for a less amount than was warranted under the instructions might furnish ground to either party to ask that it be set aside.

III. There is the further reason why the action of the trial court was erroneous. It is manifest that the court proceeded upon the assumption that the only evidence in

<sup>4. SAME:
new trial.</sup> the record tending to show a breach of the contract related to June 30, 1906. It is contended for defendant that there was evidence in the record tending to show such breach on June 16, 1906, and we think this contention must be sustained. It is true the defendant contends that the breach on June 16th was on the part of the plaintiff, and it may be that the preponderance of the evidence is to that effect. If the jury should find, however, that the plaintiff was justified in his refusal of June 16th, then the evidence did tend to show a breach then and there on the part of the defendant. The trial court instructed the jury that the measure of damages was the difference between the contract price and the market price on the date of the breach. Applying this instruction to June 16th and the state of the market on that date, the verdict was in exact accord with that instruction and the evidence.

We think, therefore, that there was evidence to sustain the verdict in the amount rendered, and that in this respect the verdict furnished no ground for a new trial to either party. For this error in entering judgment for a larger amount than the verdict, the case must be reversed and remanded.

The appellant asks that, if the case be reversed upon this ground, we remand it for a new trial. This demand is resisted by the appellee as we understand his argument.

5. **SAME:**
appeal: entry
of judgment.
In any event, the appellee did not ask for a new trial in the court below, nor does he ask here that the case be remanded for a new trial if reversed on this ground. We find no error in the record entitling the defendant to a new trial. It will be ordered, therefore, that the judgment below be reversed, and that the case be remanded, with directions to the trial court to enter judgment on the verdict as rendered by the jury for \$133.50 with 6 percent interest thereon from the date of the verdict. *Reversed and remanded.*

C. R. ROBBINS, Appellant, v. J. B. ARCHER, Appellee.

Easements: RIGHT OF WAY: FORFEITURE: INJUNCTION. Where the purchaser of a tract of land also acquired from his grantor, as a part of the consideration, a road thereto over other land belonging to the grantor, for such time as he should keep the gates opening into the same closed, the easement thus acquired could not be forfeited at the pleasure of the grantor or his grantees, but only upon breach of the condition upon which the easement was granted.

The evidence is held insufficient to show a breach of the condition and plaintiff is entitled to a protection of his rights in the easement by mandatory injunction, as against defendant's arbitrary closing of the way granted and tender of another way which plaintiff was under no obligation to accept.

Appeal from Taylor District Court.—Hon. H. M. TOWNER,
Judge.

THURSDAY, JUNE 16, 1910.

SUIT in equity to enjoin defendant from obstructing a private right of way, and to compel him to remove certain obstructions therefrom. Damages were also claimed because

of the alleged obstruction. Defendant pleaded forfeiture of plaintiff's rights, if he had any, by reason of failing to comply with the conditions upon which the same was granted, denied plaintiff's right to the easement, and further pleaded that he was not entitled to relief in equity. The trial court gave plaintiff judgment for the sum of \$1, and in effect dismissed the petition insofar as it asked equitable relief. Plaintiff appeals.—*Reversed and remanded.*

G. B. Haddock and William M. Jackson, for appellant.

E. A. Pace and McCoun & Burrell, for appellee.

DEEMER, C. J.—In the year 1908 plaintiff purchased the farm now used and occupied by him from one Jesse Clark, and as part of the consideration therefor he, Clark conveyed to plaintiff the right of way in question over other lands belonging to Clark. The language of this conveyance was as follows: "Chauncy R. Robbins to have the use of the road now used by Jesse Clark out to the street, not to be over sixteen feet wide, as long as he keeps the gates closed."

The road thus conveyed and referred to while over other lands belonging to the grantor Clark is sufficiently identified by the testimony. The deed which conveyed the land and this right of way was duly acknowledged and recorded on the 8th day of November, 1900. Plaintiff immediately went into the possession of the premises conveyed, and commenced using the road and continued in the use and occupancy of the same until defendant, who had purchased the land over which the right of way was granted, fenced the same, and denied plaintiff's right to use it. He told the plaintiff, however, that he could use another right of way across his, defendant's farm, but, as this was not acceptable to plaintiff, he, plaintiff, commenced this action to compel the removal of the obstructions and

for damages. The conveyance of the right of way was conditioned upon plaintiff's keeping the gates closed, and it is contended that the right was forfeited for breach of this condition. The trial court found that there was no such breach of condition, but denied the injunction because defendant had offered another right of way across his land which gave plaintiff access to his property. That plaintiff was given the right to use the road in question, and that such right was based upon a good and adequate consideration, is practically conceded, and it makes little difference in so far as this controversy is concerned whether it be called a license or an easement. In either event it was not forfeitable at pleasure, but only for good cause; i. e., breach of the condition upon which it was granted. The trial court found there was no such breach of condition, and with this conclusion we are agreed. As the deed granting the right was recorded, and as plaintiff was in possession of and using the same when defendant purchased from Clark in the year 1906 his, defendant's, purchase was subject to plaintiff's rights, and defendant has no greater rights in the premises than his grantor Clark would have had.

Defendant concedes that he built fences across the right of way so granted; but claimed that, as he offered plaintiff another right of way which was adequate, plaintiff was bound to accept it in lieu of the one granted, or, if not bound to accept, that he could not have a mandatory injunction for the opening of the way granted, but must be confined to an action for damages. It is true that defendant did offer plaintiff another way, but plaintiff refused to accept it because it was over low ground and "sleepy places," rendering it unpassable in wet weather, whereas the right of way given him by his deed was always passable. The trial court evidently found one road was as good as the other, and, proceeding upon the theory that the action was for trespass, denied the equitable relief

asked on the theory that plaintiff had not suffered, and would not suffer more than nominal damages. In this we are constrained to hold there was error. Plaintiff was granted the use of a definite road in order to reach a named street. That grant was part of the consideration for his conveyance, and to it he was entitled. It was not for defendant to take it away and say that another was as good or even better than the one granted. Without his consent plaintiff should not be deprived of the right of way granted. He did not at any time consent to accept the substitute; and he is entitled to protection in equity, although he may not be able to show any advantage to himself in retaining the use granted. He had a license or easement, call it what you will, and a court of equity will protect it. *Brown v. Honeyfield*, 139 Iowa, 414. If the action were simply for a single trespass or for damages alone, doubtless defendant's contentions would be worthy of consideration; but they are not applicable to the case as it is presented by the record now before us. The right of way granted by the deed is clearly and certainly identified, and it is shown to be the one bargained for by plaintiff. He is entitled to have it and not some other which defendant has seen fit to tender even if that other be not as good as the one tendered. That a mandatory injunction will lie to protect a license or easement over the land of another is well settled by authority. See in addition to the case already cited, *Attorney-General v. Algonquin*, 153 Mass. 447 (27 N. E. 2, 11 L. R. A. 500); *Willoughby v. Lawrence*, 116 Ill. 11 (4 N. E. 356, 56 Am. Rep. 758); Pomeroy's *Equity Jurisprudence*, section 1342, and cases cited.

The cases cited by appellee's counsel are not in point as they refer either to actions of trespass or to actions other than the protection of a definite easement or license. The judgment must be reversed, and the cause remanded for a decree in harmony with this opinion.—*Reversed and remanded.*

**MAXWELL CASE, Appellee, v. THE CHICAGO GREAT
WESTERN RAILWAY COMPANY, Appellant.**

Railroads: CROSSING ACCIDENT: CONTRIBUTORY NEGLIGENCE. A traveler about to cross a railroad track must use reasonable precaution for his own safety, he can not drive heedlessly upon the track without looking or listening for approaching trains and hold the railway company liable for his injuries; but he has the right to assume that trains will be run at a lawful rate of speed and that the railroad company will comply with its duty when they are approaching a crossing; and he is not as a matter of law, required to stop his team before crossing, or to look and listen for an approaching train. But whether he was negligent in failing to do so in a given case is generally a question for the jury.

Same: EVIDENCE. In this action for injury to plaintiff and his team while attempting to cross a railroad track the evidence relating to the speed of the train, the giving of signals and plaintiff's precaution for his own safety is reviewed, and is held to present a question of contributory negligence for determination by the jury.

Same: CONTRIBUTORY NEGLIGENCE: INSTRUCTION. Whether plaintiff might have seen the approaching train at the time and place he testified to having looked and listened therefor was, under the evidence, a question of fact, and the defendant was not entitled to an instruction that if he could have seen the train at that time and place he must be held to have seen it, or that he did not look and listen for it.

Same: INSTRUCTION. A requested instruction which singles out certain evidence without regard to other evidence bearing upon the question, or which is purely argumentative, or which assumes as a fact a question concerning which there is a dispute in the evidence, should not be given.

Same. An instruction that it was plaintiff's duty when he arrived at a point from which an approaching train could be seen to exercise precaution by looking for its approach, and if the train which injured him was in plain sight from the point where it was his duty to look, and the circumstances suggested a reasonable probability of danger, an attempt to cross was negligence, was not

objectionable because of the use of the words "plain sight," as the same should be construed to mean within the range of plaintiff's vision.

Appeal from Black Hawk District Court.—Hon. Chas. E. RANSIER, Judge.

THURSDAY, JUNE 16, 1910.

ACTION at law to recover damages for injuries received by plaintiff due to his wagon being struck by one of defendant's trains at a street crossing in the city of Waterloo. Trial to a jury, verdict and judgment for plaintiff, and defendant appeals.—*Affirmed.*

Carr, Carr & Evans and J. E. Williams, for appellant.

C. W. Mullan and B. F. Swisher, for appellee.

DEEMER, C. J.—While driving a covered milk wagon along what is known as Franklin Street in the city of Waterloo, plaintiff was struck by one of defendant's trains at the crossing of said street, and received the injuries of which he complains. There was no flagman at the crossing and plaintiff claims that the bell on the engine was not rung or the whistle sounded or any other warning given of the approach of the train. He further claims that the train was running at a high and dangerous rate of speed, to wit, from fifteen to twenty miles an hour, which speed was unlawful under the ordinances of the city, which fixed the rate within the city at eight miles per hour; that he both looked and listened for the approach of the train and did not see or hear it, and that notwithstanding due care on his part he was struck and injured. There was a conflict in the testimony upon many of the material points, but the jury returned the following answers to special interrogatories submitted, which answers in view of the

conflict in the testimony must be regarded as conclusive. These answers were as follows: "(1) Was the engine bell ringing as the train approached Franklin Street? Answer: No. (2) Was the whistle sounded for the station? Ans.: Yes. (3) Was the whistle sounded for the street crossing between the viaduct over the Illinois Central Railway and Barclay Street? Ans.: Yes. (4) At what rate of speed was the train moving at the Walnut Street crossing? Ans.: Fifteen to twenty miles." That these answers show negligence upon the part of the defendant is practically conceded; but it is strenuously argued in many different ways that under the undisputed testimony as applied to familiar rules of law plaintiff was guilty of contributory negligence, and that there should have been a verdict for the defendant. This contention calls for a brief recital of the testimony from plaintiff's standpoint.

Franklin Street is one of the important streets of the city. It is near the business portion, is paved, and crosses defendant's tracks between Sixth and Seventh Streets. Franklin Street runs east and west, and defendant's track runs a little east of north from its junction with Franklin Street. Upon the block immediately north of Franklin Street and west of Seventh, there is a lumber shed and office, a lumber yard and coal shed and three dwellings, all obstructing the view of a train coming from the north on defendant's tracks. It is impossible, as we understand it, to see a train coming from the north in passing from the east side of Seventh Street until one gets within from fifteen to twenty feet of the east rail of defendant's main line track; but it is conceded that at a point seventeen feet from this east rail it is possible to see a train coming from the north a distance of four hundred and seventy-seven feet. Just prior to receiving his injuries plaintiff was driving westerly along Franklin Street toward the railway tracks, his team moving at a rapid walk. When he approached the fill upon which the track was

laid, which is shown to be between four and five feet above the grade of the street at the crossing, he slowed his team down, and it was walking slowly as he approached the crossing. As he came to the place where he had an unobstructed view of the track he, according to his testimony, which has some corroboration, pulled his team to a stop or practically to a standstill, looked northeasterly and along the track and as far as he could see, and listened for the approach of a train. Seeing or hearing nothing he looked down the track in a southwesterly direction for trains which might be coming from the south. None being in sight or hearing in that direction, he proceeded to cross the track, and just as his horses had gotten over the tracks and while his wagon was upon them he heard a train coming from the north, cast his eyes in that direction, and discovered the rapidly moving train within one hundred and fifty feet of him. He then attempted to back his team off the track, but was unable to do so, and the team and wagon were both struck by the train, one horse killed, the wagon badly broken, and plaintiff thrown out, struck by the locomotive, and badly injured. The Walnut Street crossing referred to by the jury was three hundred feet north of the one at Franklin Street. Two boys were riding on the wagon which plaintiff was driving, one upon the right or north side, and the other upon the left or south side as it approached the crossing. These boys were standing upon steps near the middle of the wagon, and the boy on the right side of the wagon, testified that as plaintiff approached the railway crossing he stopped the team; that he (the boy) heard no locomotive whistle and that no bell was rung, and that he did not see the train until just before it struck the wagon, when he jumped and escaped injury. Defendants say, however, there is no testimony that plaintiff slackened the speed of, or stopped his team before reaching the crossing; no testimony that he looked to the northward for the approach of a train, or, rather, that although plain-

tiff testified that he did look and saw no train, his testimony should be disregarded, for that if he did look at the point he said he did he could not help seeing the train, and for these reasons that plaintiff was guilty of contributory negligence as a matter of law and should not recover.

In the first place it is not true, as a matter of law, that one must stop his team before crossing a railway track. Whether or not he should do so in any given case is a

question of fact for the jury and not of law for the court. *Selensky v. R. R. Co.*, 120 Iowa, 113; *Lorenz v. R. R. Co.* 115 Iowa, 377; *Willfong v. R. R.*, 116 Iowa, 548, and cases cited.

But it is said that under the testimony plaintiff either did not look for the approaching train, or if he looked he must have seen it in time to have avoided the injury, and in either event he was guilty of contributory negligence. Generally speaking the question of contributory negligence in such cases is for the jury. *Cummings v. R. R.*, 114 Iowa, 85; *Schulte v. R. R.*, 114 Iowa, 89; *Meyer v. R. R.*, 134 Iowa, 722, and cases cited. Of course one may not heedlessly drive upon railway tracks at street crossings without looking or listening for approaching trains and hold the railway company liable, no matter how negligent it may have been. One about to cross a railway track must take reasonable precautions for his own safety. He must sometimes stop his team and look and listen, and in any event must both look and listen before subjecting himself to the dangers from passing trains. *Payne v. R. R.*, 108 Iowa, 188; *Moore v. R. R.*, 102 Iowa, 596; *Cummings v. R. R.*, *supra*; *Starry v. R. R.*, 51 Iowa, 419. But one about to cross a railway track has the right to assume that trains will not be run at an unlawful rate of speed; that the usual and customary warnings will be given; and that the railway company will comply with its duty in approaching street crossings. *Correll v. R. R.*, 38 Iowa, 120; *Cummings v. R. R.*, *supra*; *Moore v. R. R.*, *supra*.

One about to cross a railway track is not bound, as a matter of law, to look or listen for a train at any given point. Whether or not he looked and listened at a point where he might have seen the train and avoided the injury in the use of ordinary care and prudence is generally a question for the jury, and the instant case was submitted to the jury on that theory. Without absolutely disregarding the testimony, we must say that the jury were justified in finding that plaintiff either slackened the speed of his horses or stopped them; that at a point seventeen feet from the track he looked in a northeasterly direction for an approaching train, saw none, although he had an unobstructed view of the track for something like four hundred and seventy-seven feet; that he then looked to the southward, as was his duty, for trains coming from that direction, his team in the meantime walking slowly toward the track, and that neither he (plaintiff) nor the boy who was on the right side of the wagon riding with him heard or saw the approaching train until it was within one hundred and fifty feet of them. A jury was justified in finding that the train which struck the plaintiff was running at from fifteen to twenty miles per hour; that it passed over at least three hundred and twenty-seven feet while plaintiff's team covered the seventeen feet between the place where plaintiff says he stopped and the east rail of the track, and the distance from the east rail to the other side of the track. It took some time for plaintiff to look to the south and assure himself there was no danger from that direction. So it is apparent that because of the higher rate of the speed of the train plaintiff was placed in a position of peril which would not have existed had the train been run at eight miles per hour or had the usual signals been given of the approach of the train. Appellant's counsel have made what they call a mathematical demonstration of plaintiff's contributory negligence. Such figures are not always

reliable because witnesses can not state with accuracy distances, rates of speed, etc. Aside from this, however, the figures furnished by appellant's counsel are based upon testimony which is the subject of dispute. Moreover, appellant's counsel in making their figures do not allow anything for the time required of plaintiff in looking for a train from the south, nor do they give any regard to the fact that plaintiff's team was upon or just over the track when plaintiff saw the engine. Taking these facts into account it is manifest that the train was not in sight if running at the rate of twenty miles per hour when plaintiff looked toward the north. The question of contributory negligence was manifestly for the jury.

II. Appellant asked an instruction reading as follows: "If you find that the defendant's train was at any place within four hundred and seventy-seven feet of the place on Franklin Street which is marked 'A' on plat in evidence, and which is seventeen feet from the southeasterly rail of the main track,

3. SAME:
contributory
negligence:
instruction.
at the time plaintiff testifies he looked in a northeasterly direction to see if a train was approaching, then you should disregard his testimony that he looked for an approaching train at the time and place he testifies he slowed down his team and looked and listened to ascertain if a train was approaching." Such a thought may well be made in argument to a jury, but it will hardly do to announce as a rule of law that if one could have seen a train at a given time and place he must be held to have seen it, or that he did not look and listen for it. This may, under some circumstances and perhaps under most, be regarded as a logical proposition, but it is not a legal one. Whether or not a person did look and listen, and whether or not he saw or should have seen an approaching train are questions of fact for a jury and not of law for the court. Neither of the cases cited and relied upon by appellant announces

any such rule of law as is set forth in the requested instruction.

Moreover it singles out certain testimony bearing upon plaintiff's case without regard to the other evidence in the case, and is purely argumentative in character. It was

^{4. SAME:} for the jury to say whether or not plaintiff instruction. looked for the train, at what place he looked, and whether or not he saw it before he was struck. Again, even if plaintiff saw the train four hundred and seventy-seven feet away, and it had been running at a proper rate of speed, he (plaintiff) might safely have crossed ahead of it and his act in attempting to do so would not necessarily constitute contributory negligence. Another reason for not giving the instruction is that it stated that plaintiff looked at a point seventeen feet from the east rail of the track. This was a matter in dispute. Some of the witnesses testified it was twenty feet from the rail where plaintiff looked. Of the other instructions asked by defendant, those which announced correct rules of law were given by the court in its charge, and there was no error in refusing them.

III. A part of the eighth instruction given by the trial court reads as follows: "It was the duty of the plaintiff to take reasonable precautions to ascertain if a train was

^{5. SAME.} coming which might endanger him at the crossing, and to make reasonable use of his senses by listening for signals or the noise of the train when within a reasonable distance from the crossing, and when he arrived at a point from which a train could be seen, by looking in the direction which a train might come; and, if the train in question was at the time in plain sight or hearing from the point where it was the plaintiff's duty to so look or to so listen for trains, and so circumstanced as to suggest reasonable probability of danger, an attempt to cross the track would be negligence which would defeat his recovery of damages for injury thus received."

The use of the words "plain sight" are criticised.

They have been used many times in the opinions of this court in referring to the same subject as in *McLeod v. R. R. Co.*, 125 Iowa, 273, and in our opinion are not objectionable. "Plain sight" means nothing more than that the train was within the range of plaintiff's vision, had he been looking in that direction. If the train was obstructed or could not readily be seen, then it was a question as to whether or not plaintiff was bound to see it. If in plain sight, then, under the instruction, plaintiff was bound to see it and to govern himself accordingly. In order to show with what care the case was submitted we here quote the next paragraph of the instruction complained of: "If obstructions to his view when approaching the track, or if interference with his hearing while his team was in motion, or other circumstances, indicated that it was essential for him to stop his team and wagon in order to overcome the noises within his control, and to better see and hear whether it was safe for him to cross, it was his duty to stop, and if the neglect on his part to perform any of such duties to look, or listen, as so required of him, contributed to cause the accident, it would preclude any recovery by the plaintiff even if you should find that the defendant was also negligent, or failed to give signals, maintain a flagman, or was running at an excessive or unlawful speed."

The case was fairly submitted to the jury, and the verdict has support in the testimony, and as we discover no prejudicial error the judgment must be, and it is, *affirmed*.

INDEX.

ACTIONS	TO	AGENCY
---------	----	--------

ACTIONS. See VENDOR AND VENDEE.

Assignment of cause of action: Evidence. In this action to recover by an assignee of a claim for damages, evidence of the assignment of the claim is reviewed and held to present a question for the jury. *Hoppes v. Des Moines City Ry. Co.*, 580.

Dismissal of action as to nonresident defendant. Where an action is against several defendants, some of whom are nonresidents of the county, and the action is dismissed as to the resident defendants, such nonresidents may have the cause dismissed as to them; but before they are entitled to a dismissal they must establish the fact of nonresidence. *Constantine v. Grupe Co.*, 142.

General appearance: Service of notice. General appearance to an action in replevin is effected by the filing of a motion assailing the writ for insufficiency of the petition and attacking plaintiff's claim to possession of the property, rendering service of an original notice unnecessary. *Bummelhart v. Boone*, 390.

Venue. An action to compel the assessment of benefits under a death policy may be brought and maintained in the county where the insured died. *Jenkins v. Association*, 113.

ADMINISTRATORS. See ESTATES OF DECEDENTS.

ADVERSE POSSESSION. See REAL PROPERTY.

AGENCY.

Brokers: Recovery of commission: Evidence: Instruction. A real estate agent seeking to recover commission under an alleged contract providing for the same, on condition that he urge a certain person to purchase the property, need not show that his urging such party was an inducement or the procuring cause of a sale, but he may recover on proof that he urged such person to buy and that he purchased the property. *Tuffree v. Saint*, 361.

AGENCY Continued

Same: Instructions. Plaintiff's version of the commission contract in the instant case was that defendant agreed to pay a commission if plaintiff would see a certain person and urge him to buy the property, and that he saw and urged such person, who purchased the same. The defendant's version of the agreement was that the plaintiff should induce such person to purchase, and under either version of the contract the evidence justified a finding for plaintiff. *Held*, that an instruction requiring plaintiff to show that he had a contract with defendant requiring him to urge such person to purchase the property, and that if he failed to do so he could not recover, was not in conflict with another instruction regarding defendant's claim that plaintiff should induce a sale, so as to justify a reversal of the judgment for plaintiff. *Idem*.

Commission contract: Evidence. In this action to recover commission for the sale of real estate, the evidence is reviewed and held insufficient to establish the contract sued upon for a stated commission. *Jones v. Buck*, 494.

Same: Estoppel. Where a real estate agent, as in this case, consented to an abandonment of the sale he had been negotiating and returned to the proposed purchaser his deposit of earnest money, the agent was thus estopped from claiming a commission, unless as contended he fulfilled the conditions on which he then secured the right to an extension of the time for making the sale for the purpose of securing a loan for the purchaser, thus to enable him to complete the purchase; but the evidence fails to establish compliance with the extension agreement. *Idem*.

Contracts of agency: Fraud: Concealment of facts by agent: Evidence. An agent is bound to disclose to his principal every material fact relating to the business intrusted to him. In this action by advertising brokers for commissions it is held, that the giving of secret premiums by plaintiffs to procure the publication of defendant's advertisements, which were not contemplated by the contract with defendant, amounted to a breach of good faith and deprived defendant of the material advantage relied upon and inducing the contract, and that plaintiffs were therefore not entitled to recover commission. *Hewitt & Hosier v. Lichy Mfg. Co.*, 270.

Evidence: Admissions of agent. Statements of plaintiff's agent concerning the quality of the stock food and its continued use, made long after the sale and when he was not engaged in the performance of any duty within the scope of his employment, were not binding upon the plaintiff. And as he had neither examined the food, nor investigated the condition of the cattle to which

AGENCY Continued

TO

APPEAL

it had been fed, as defendant knew, and had given no opinion of its effect based on information, his advice to keep trying it and see if the right amount to feed could not be determined, amounted simply to a suggestion that defendant conduct an experiment, and evidence of such suggestion was not admissible as bearing on defendant's conduct in continuing to use the food after discovering its injurious effects. *Swift & Company v. Redhead*, 94.

Principal and agent: Duty of agent when purchasing principal's property on his own account: Fraud: Evidence. Where an agent having authority to sell the property of his principal proposes to become the purchaser on his own account, he must not only do so with his principal's consent, but he must in the strictest of good faith impart to his principal all the information which he has concerning the property and its value. Where, however, the agency was merely to lease and collect rents and such agent enters into independent negotiations with his principal to purchase the property, no suspicion of fraud arises from that fact alone, and he is under no obligation to assist the principal in obtaining the highest possible price, but the parties are then dealing at arm's length and it is the right of the agent to obtain the property for the least sum possible, without aiding the principal with reference to the sale.

In the instant case defendants' agency was to care for and lease the property in question, never having had any authority to sell; and upon a review of the evidence it is held that no fraud or concealment was practiced by the agents by which their principal was induced to sell the property to them for less than its value; and they are not therefore required to account for profits made on a resale of the property. *Douglass v. Lougee*, 406.

PRINCIPAL AND AGENT. See AGENCY.

APPEAL. See WILLS.

Abstract: Conclusiveness. Where no transcript was filed in support of appellant's claim that there was evidence that funds garnished were exempt, and no such evidence appeared in the record, the appellee's amended abstract asserting that there was no such evidence will be taken as true. *Dolan v. Sammons*, 46.

Briefs: Specification of errors: Review. Although a formal assignment of errors on appeal is no longer essential, still the appellant's brief should indicate clearly the errors he desires to have reviewed; and while it is desirable that the Supreme Court rule relating to brief making should be observed, failure to do so is not jurisdictional, and the court is not required to decline to pass

APPEAL Continued

upon asserted errors, even though the brief does not comply with the rule. *Blackett v. Ziegler*, 167.

Appeal on certificate: Sufficiency of certificate and abstract. Although the statute provides that the certificate in cases of appeal involving less than one hundred dollars shall be made by the trial judge, still, where it appears from the abstract that the certificate was made by the judge while sitting as a court there is a sufficient showing of compliance with the statute. But if this were not so the abstract in the instant case not only states that the court signed the certificate but it sets out the certificate in full which purports to be signed by the judge and is therefore sufficient. *Salinger v. Telegraph Co.*, 484.

Motion for affirmance: Service of argument. A motion for affirmance for failure of appellant to serve his argument in time should be made before the original submission of the cause, and when filed with the petition for a rehearing after the opinion has been rendered on the original submission, it will not be considered. *Idem.*

Same: Failure to serve argument: Effect. Although a failure of appellant to serve his argument in time would furnish an excuse for the failure of appellee to file his argument in answer to it, it would not be an excuse for failure to ask an affirmance on account thereof before the original submission. *Idem.*

Sufficiency of certificate. The certification of a cause to the Supreme Court for review involving less than one hundred dollars must cover the entire record upon which the questions to be reviewed arise; a certification merely of questions as to the admissibility of evidence is not sufficient to authorize a review thereof. *Fritz v. Snider*, 352.

Bill of exceptions: Argument. It is the privilege of a party to incorporate in a proper bill of exceptions any prejudicial matter not otherwise appearing, and failing to do so he can not state such matter in argument as the basis of complaint. *Gregory v. Chicago, R. I. & P. R. Co.*, 715.

Failure to disclose error: Affirmance of ruling. An order striking certain paragraphs from a petition will be affirmed on appeal where the matter pleaded in the paragraphs not stricken is not shown in the abstract; since by failure to disclose the same the court is unable to determine whether the party appealing was injured by the ruling. *Collins v. City of Keokuk*, 605.

Jurisdiction: Amount in controversy. To authorize an appeal

APPEAL Continued

from the district court without a certificate the amount in controversy must exceed one hundred dollars, but the amount in controversy is to be determined from the pleadings including counter-claims. In this action to enjoin defendant township trustees from paying out township money, and to compel them to replace money already expended, the amount involved as shown by the pleadings is held sufficient to confer jurisdiction on appeal without a certificate. *Davis v. Laughlin*, 478.

Objection to jurisdiction: How made. An objection to the jurisdiction of the court to entertain an appeal, which is not made in printed form and served upon the appellant as provided by statute, will not be considered. *Stein v. McAuley*, 630.

Motion for a new trial: Scope of review. Where an appeal is not taken within six months from the rendition of judgment, but within six months from the overruling of the motion for a new trial, only those questions involved in the ruling upon the motion will be reviewed. *Cox v. Express Co.*, 137.

Motion to strike. As a rule an appeal will not lie from a ruling on a motion to strike, or for a more specific statement. *Barnes v. Savings Bank*, 267.

Exception to rulings: Review. The appellate court will not consider rulings made upon the trial to which exception has not been duly taken. *Idem*.

Waiver of objection. Any error in ruling upon a motion to strike, or for a more specific statement, is waived by an amendment to the pleading objected to. *Idem*.

Retaxation of costs: Presumption on appeal. The trial court may examine the transcript of evidence for the purpose of determining the cost of making the same; and it will be presumed on appeal that the lower court made a proper ruling on a motion to retax such costs, in the absence of a contrary showing, and the appellate court will not go to the certified transcript to determine the facts for itself. *Stewart v. Coal Co.*, 348.

Review of exceptions not argued. Where the exceptions to instructions are not argued and no complaint against them is embodied in appellant's brief they will not be considered on appeal. *Hamm v. Bettendorf Axle Co.*, 681.

Review of particular issues. Where no appeal is taken from the judgment upon particular issues the same will not be reviewed although argued on the appeal. *Citizens Nat. Bank v. Gardner*, 695.

APPEAL Continued

TO

ATTORNEY FEES

Questions not within the issues: **Review.** Questions not within the pleadings and not presented and passed upon by the trial court are not subject to review on appeal. *Tyrrell v. Shannon*, 184.

ARGUMENT. See **NEW TRIAL**

ATTACHMENT. See **CHATTTEL MORTGAGES.**

Garnishment: **Answer of garnishee:** **Bill of exceptions:** **Exemptions:** **Burden of proof.** The answers of a garnishee to interrogatories are not matters of pleading but of evidence, and must be made of record by a bill of exceptions to be considered on appeal. And where it is claimed that the property garnished is exempt the burden is upon the party claiming the exemption to establish the same. *Dolan v. Sammons*, 466.

Exemplary damages: **Liability therefor on indemnifying bond.** The statutes require an officer to levy under a writ of attachment upon any personal property which the plaintiff points out and directs him to levy upon, and to proceed to subject the property upon the giving of an indemnifying bond by the plaintiff; and any liability of the officer for exemplary damages in so doing must arise from his acts outside the line of his duty as an officer, and the attaching plaintiff is not liable therefor on the indemnifying bond unless he is a party to such acts. *Constantine v. Grupe Co.*, 142.

Same. A claimant of property held under an attachment can only recover of the officer actual damages for a wrongful levy, and he has no greater right in an action upon an indemnifying bond. *Idem.*

Same. It is the general rule that where the claimant of attached property elects to recover damages on an indemnifying bond he is only entitled to such damages as are compensatory, both as against the principal and sureties, unless it is otherwise provided in the bond. *Idem.*

Same: **Recovery of attorney fees.** The right to recover attorney fees is purely statutory, and as the statute providing for damages on an indemnifying bond in an attachment suit does not authorize a recovery of such fees, the claimant of the property can not recover in an action on the bond for fees incurred in intervening in the attachment suit and securing a release of the property. *Idem.*

ATTORNEY FEES. See **ATTACHMENT—INTOXICATING LIQUORS.**

BANKS AND BANKING

TO

CARRIERS

BANKS AND BANKING.

Special deposit: Application to debt due the bank. A bank to which a depositor is owning a matured indebtedness may appropriate a general deposit of the debtor to a discharge of the debt; but it has no such right where a deposit is made for a special purpose or under a special agreement. *Smith v. Sanborn State Bank*, 640.

BILLS AND NOTES. See **NEGOTIABLE INSTRUMENTS.**

BONDS. See **ESTATES OF DECEDENTS.**

BROKERS. See **AGENCY.**

CANCELLATION OF INSTRUMENTS. See **CONTRACTS—EQUITY.**

CARRIERS.

Shipment of property by express: Oral contract: Evidence. In this action against the defendant express company by the consignee of a horse shipped under an alleged oral agreement with plaintiff, the fact that the party delivering the animal to the express company signed a contract for its transportation did not prevent plaintiff from proving his oral contract, in the absence of any proof that the party delivering the animal to the company was acting as his agent; the two contracts being entirely distinct and between different parties. The evidence in this case is held sufficient to take the question of an oral contract of transportation to the jury. *Cox v. Express Co.*, 137.

Same. Where an express company has contracted to transport property under an oral contract with the consignee, it will not be relieved of the duty of performing such agreement by the fact that it induced the party delivering the property to the company to sign a written contract of transportation, it not being shown that such party acted as the agent of the consignee. *Idem.*

Same: Negligence: Evidence. The evidence in this action is held sufficient to take the question of defendant's negligent care of the property while in transit to the jury. *Idem.*

Transportation of live stock by freight: Negligent delay: Evidence. The rule that a carrier is not liable for failure to feed and water animals in transit where the same are accompanied by a caretaker, unless it fails to furnish the party in charge with proper facilities for caring for the animals when requested, does not relieve the carrier from liability for negligent delay in trans-

CARRIERS Continued

TO

CHATTEL MORTGAGES

portation which the caretaker can not prevent by the exercise of reasonable diligence. The evidence in this case is held to show unreasonable delay by a connecting carrier. *McMillan v. Great Northern Ry. Co.*, 596.

Same: Connecting carriers: Agency. The agents of a transfer company taking a car from the initial carrier and switching it to the connecting carrier are also agents of the connecting carrier, in the sense that it is only through them that it can be advised that the car is ready for transportation by it. *Idem.*

Same: Unreasonable delay: Burden of proof. The burden of establishing any special excuse for failure to make prompt shipment is upon the carrier. *Idem.*

Same: Connecting carriers: Duty to transport. It is the duty of a connecting carrier to receive and transport cars delivered to it without waiting for a new contract of shipment; especially where the carrier did not advise the shipper that it would not transport the same until a new contract was made. *Idem.*

CHATTEL MORTGAGES.

Foreclosure: Attachment: Waiver of mortgage lien. Under the law of this state a chattel mortgagor retains the legal title to the property, and his equity of redemption is the subject of levy and sale: So that a mortgagee does not waive his right to foreclose the mortgage by levying an attachment upon the property. *Stein v. McAuley*, 630.

Same. The above rule is especially applicable where the attachment suit was dismissed before trial, as in this case. *Idem.*

Same: Election of remedies: Estoppel. By suing out an attachment on chattel mortgage property the mortgagee does not elect his remedy so as to deprive him of subsequently foreclosing the mortgage, since the two proceedings are not inconsistent. And the fact that the mortgagor incurred expenses in resisting the attachment will not estop a foreclosure of the mortgage, especially where, as in this case, there were other attachment suits against the property instituted prior to the commencement of the mortgagee's suit. *Idem.*

Mental capacity of mortgagor: Evidence. In this action which is a suit upon promissory notes and to foreclose chattel mortgages securing the same, the evidence is reviewed and held to show mental incapacity of the mortgagor at the time he executed the

CHATTTEL MORTGAGES Continued TO CONTEMPT

notes and mortgages in question. *Citizens Nat. Bank v. Gardner*, 695.

Same: Notice. The evidence is also reviewed and held sufficient to charge the mortgagee with notice of the mental incapacity of the mortgagor. *Idem.*

Same: Counterclaim by guardian: Admission of plaintiff's cause of action. A guardian of an incompetent chattel mortgagor may, as in this case, counterclaim against a suit to foreclose the mortgages for payments made by the mortgagor from a sale of part of the mortgaged property, without conceding thereby the validity of the mortgages. *Idem.*

CONSTITUTIONAL LAW. See INTOXICATING LIQUORS—MUNICIPAL CORPORATIONS.

CONTEMPT. See SCHOOLS.

Information: Who may file same: Prosecution. It is not essential that the information in contempt proceedings for the violation of an injunction be filed by the plaintiff in the original action; nor is it essential that the county attorney appear and prosecute the contempt proceeding. *Dermedy v. Jackson*, 620.

Title of proceeding. The title of a contempt proceeding is not very material; it may be under the title of the cause to which it is incident, or it may be in the name of the state against the defendant. *Idem.*

Identity of premises. Where the description of premises in a contempt proceeding is by lot and block, the same as in the action to enjoin the nuisance, there is a sufficient identity of the premises although there may be a discrepancy in the name of the building. But were this not true the effect of the claimed discrepancy can not be raised for the first time on appeal. *Idem.*

Violation of decree: Notice. A defendant in an injunction proceeding is bound to obey the order of court even though erroneous and so held on final hearing: And this is true where he has actual notice of the order even though he had not been served with a copy of the writ. *Carr v. District Court*, 663.

Same. The violation of an injunctive order by any device or subterfuge will not be permitted; and the fact that defendants are public officers does not change the rule. *Idem.*

Same: Discretion: Review. A proceeding to punish one for civil

CONTTEMPT Continued

TO

CONTRACTS

contempt is addressed to the discretion of the court, in the absence of statutory regulations, and its determination will stand unless gross abuse of such discretion is shown. And as a rule the appellate court in reviewing a contempt proceeding will not consider questions of fact. *Idem.*

Same. A contempt proceeding is in its nature criminal, or what may be termed *quasi* criminal, and to warrant punishment a clear case of contempt must be shown. *Idem.*

Same: Defenses. Advice of counsel is not a defense to a proceeding to punish for contempt, although it may be considered in mitigation; nor is ignorance of the law in itself a defense in such cases except where criminality or guilt depends upon the intention with which the act is done; but changed conditions may always be considered in determining the question of guilt or innocence. *Idem.*

CONTRACTS. As to **REAL PROPERTY**, see that title. See also, **MUNICIPAL CORPORATIONS**.

Breach of contract: Damages: Mental anguish. Damages for mental anguish growing out of a breach of contract to pay money are not recoverable, but generally the damage in such cases is confined to the sum wrongfully withheld, with interest. The cases in which a recovery may be had for mental anguish because of the breach of a contract are those in which an action for the breach, if the plaintiff so elects, may be brought, sounding in tort. *Smith v. Sanborn State Bank*, 640.

Cancellation: Fraud: Evidence. In this action to rescind a contract and cancel notes given for an exclusive agency to sell a patent device, the evidence is reviewed and held insufficient to show that the execution of the same was induced by fraud or misrepresentation. *Owen v. National Hatchet Co.*, 393.

Unilateral agreements. Where a contract is made in duplicate failure of one of the parties to sign both papers does not render the agreement unilateral. *Idem.*

Revocation. Where one party to a contract made with an agent of the other fails to repudiate the agreement until after notice of revocation by the principal, he can not then withdraw from the same except on grounds entitling him to a rescission. *Idem.*

Rescission: Fraud: Evidence. In this action to cancel a contract for an agency to sell a patented article in a specified territory, the evidence of fraudulent representations as to patents covering the

CONTRACTS Continued

article, or of failure of consideration, is held insufficient to justify rescission. *Idem.*

Contracts: Devisibility: Agreements in restraint of trade. In this action the plaintiff owned a lot on which he contemplated conducting a lumber business and had contracted for a stock of lumber, paid the freight, and placed a portion of the lumber on the lot. Thereafter he contracted to sell the lumber so purchased and not to re-engage in the business at that place for a term of two years. *Held*, that the contract of sale was not merely of a right to engage in the business but was valid under the rule permitting one to dispose of his business and to agree not to re-engage therein for a specified time and was not divisible, one part relating to the sale of the lumber and the other to refrain from re-engaging in the business. *Sauser v. Kearney*, 335.

Same: Agreements in restraint of trade: Validity. Where one has purchased a stock of goods and has paid for the same or obligated himself to pay therefor, a portion of which has been delivered and placed upon the premises whereon he contemplated conducting the business, a contract of sale of the goods with an agreement not to re-engage in the business is not invalid because of an agreement to forego the mere privilege of engaging in a prospective business. *Idem.*

Same: Action for recovery of consideration. Under a contract to purchase a stock of goods and to pay an additional sum in consideration that the seller shall not re-engage in the business for a series of years, both the purchase price of the stock and the additional sum to be presently paid, the seller may maintain an action to recover the sum agreed upon for refraining from engaging in the business, although such time has not expired. *Idem.*

Oral contracts: Determination upon conflicting evidence. Conflicting oral evidence concerning the terms of a verbal contract presents a question for the jury. *Idem.*

Genuineness of signature: Alteration: Evidence: Accounting. In this action for an accounting and judgment for a certain percent of the profits of business done by defendant under an alleged written contract, in which plaintiff was to work for defendant and recover such profits as part compensation for his services, the evidence is held insufficient to show that the contract relied upon was executed by defendant; and insufficient to show that certain erasures and interlineations in the copy of the claimed contract held by plaintiff and relied upon by him were made by defendant or with his knowledge and consent. *Shea v. Cutler*, 366.

CONTRACTS Continued

TO

CONVEYANCES

Contracts in restraint of trade: Breach: Damages: Evidence.

In an action for damages for breach of an agreement not to re-engage in a competitive business, it is proper for plaintiff to show a reduction in the amount of his business and daily sales after defendant re-entered the business, as bearing on the question of damages, even though such evidence relates to a time subsequent to the commencement of the action. *Galucha v. Naso*, 309.

Oral modification: Evidence: Statute of frauds. The statute of frauds does not forbid an oral contract or proof of the same, it only forbids oral evidence of a contract which is within its provisions. So that where the plaintiff pleads an oral modification of a written contract concerning which no material issue is raised by the answer, and the real question presented is, which of the parties breached the oral contract, the statute of frauds has no application. *Rueber v. Negles*, 734.

Same. An oral contract for the sale of crops not in existence is valid and provable by parol, and any subsequent modification may be so proven. *Idem.*

Rescission: Waiver. Where one is informed of an election to rescind his contract, but by his own act precludes the other party from stating the ground of rescission, there is a waiver of the necessity of stating the reason for rescission, and the party seeking to rescind may urge any tenable cause therefor. *Cox v. Cline*, 353.

Same: Notice of rescission: Reasonable time. The rescission of a contract for fraud must be within a reasonable time after ascertaining the fraud; and what is a reasonable time depends upon the circumstances of the case.

In the instant case the evidence is held sufficient to take the question of notice of rescission within a reasonable time to the jury. *Idem.*

CONVEYANCES. See HUSBAND AND WIFE.

Covenants: Fulfillment. The covenant of a vendor to convey by good and sufficient warranty deed is satisfied by a conveyance of such title, although it may have been acquired by long possession coupled with abandonment by the public. *Duetzmann v. Kuntze*, 158.

Mental capacity: Undue influence: Evidence. A voluntary conveyance of property by one mentally competent and without undue influence will not be disturbed by the court. In this case the

CONVEYANCES Continued	to	Costs
evidence is held insufficient to show either a lack of mental capacity or undue influence. <i>Shea v. Catholic Society</i> , 150.		

CORPORATIONS.

Individual liability of stockholders for corporate debts. The individual property of stockholders of a corporation defectively organized, because of an insufficient publication of notice of incorporation, is not liable for indebtedness contracted within three months from the date of the certificate of incorporation, such being the time allowed for publication of the notice: Nor is their property liable for a corporate debt created in renewal of obligations contracted within such time. *Bank v. Neiting*, 119.

Public service corporation: Rights and duties in supplying gas to consumers. It is the duty of a gas company operating under a franchise to supply all inhabitants of the municipality with gas on the same terms, where the conditions are the same or similar. The company may, however, adopt reasonable rules and regulations fixing the terms upon which it will supply its customers with gas, but the adoption of a formal rule is not essential to that end, where there is a well established and governing custom. It can not, however, enforce an arbitrary or discriminating rule or custom according to its whim or caprice. In this action to compel the gas company to supply plaintiff with gas the evidence is held to show that the service was cut off without just reason for believing plaintiff financially irresponsible. *Phelan v. Boone Gas Co.*, 626.

COSTS.

Taxation of costs. Where it appears that parties instituting proceedings to remove an officer for official misconduct were acting in good faith, the costs, upon dismissal of the proceeding because of insufficient evidence, should not be taxed against the plaintiff but should be assessed as in ordinary state cases. *State v. Hespers*, 712.

Taxation of costs. Where the only issue in a suit to enforce a chattel mortgage was the mental capacity of the mortgagor at the time of executing the same, which was determined against the plaintiff, the costs of the action were properly taxed to plaintiff. *Citizens Nat. Bank v. Gardner*, 695.

Same. Where the plaintiff, as in this action, brought certain parties into court and the substantial issues were determined against its claims to a preference over them in the distribution of a par-

COSTS Continued

TO

CRIMINAL LAW

ticular fund, the costs of the action were properly taxed against plaintiff. *Idem.*

COUNTIES. See MUNICIPAL CORPORATIONS.

CRIMINAL LAW. See FISH AND GAME.

Forgery: Evidence. The testimony of an accomplice, on a prosecution for forgery, as to procuring a third person to sign the name of another to the forged instrument, which was shown to have been in pursuance of a previous arrangement between the witness and the accused, was competent as against the accused. State v. Ottley, 329.

Murder in the first degree: Indictment: Sufficiency. An indictment charging that the shooting of deceased was with specific intent to kill and that it was done wrongfully, deliberately, pre-meditatedly and with specific intent to kill and murder, charges murder in the first degree. State v. Dyer, 217.

Same: Self-defense: Duty to retreat: Instruction. The killing of an assailant is only excusable on the ground of self-defense, where it reasonably appears to be the only means of saving one's own life, or preventing great bodily injury. If the danger which appears to be imminent can be avoided in any other way, as by retreating, the taking of the life of the assailant is not justifiable. *Idem.*

Same. Where it appears that the accused had a room in the house of the deceased, but that the assault was made in one of the living rooms of the house and not in the room of defendant, his duty to retreat existed the same as though the assault had occurred at some other place where the rights of each were equal. *Idem.*

Same: Submission of lower offenses. Where it is shown in a prosecution for murder that the deceased died within a few days after he was shot by defendant, the court's refusal to submit the question of defendant's guilt of some offense lower than a degree of homicide was proper. *Idem.*

Self-defense: Evidence. Under the evidence in this case the question of whether accused shot deceased in self-defense was for the jury. *Idem.*

Murder: Provocation: Instruction. To render the taking of life manslaughter instead of murder, the provocation must be such as has a natural tendency to produce such a degree of excitement or disturbance of mind of an ordinary person as to dethrone

CRIMINAL LAW Continued

reason and cause him to act from passion rather than deliberation and judgment. In this action there was evidence that defendant had previously armed himself with a deadly weapon for the encounter, and it is held that the court's instruction that to constitute great and present provocation which would render the killing manslaughter instead of murder there must be something extraordinary, was not erroneous, especially as the court also instructed that the provocation must be sufficient to excite passion in a reasonable person. *State v. Watkins*, 566.

Murder: Mitigation of death penalty: Evidence. On this prosecution for murder resulting in a judgment assessing the death penalty, the evidence is reviewed and held insufficient to show such defective mental and moral capacity of defendant as to justify mitigation of the judgment. *State v. Junkins*, 588.

Murder: Self-defense. In this prosecution for murder the evidence is reviewed and held to raise an issue of self-defense for submission to the jury. *State v. Watkins*, 566.

Rape: Age of consent: Evidence: Instructions. An instruction on a prosecution for rape committed on a child under the age of consent to the effect that her previous character was immaterial, since the statute prohibits intercourse under any circumstances with a child under fifteen years of age, but that evidence of her previous conduct should be considered as bearing on her credibility, was not objectionable as assuming that she was under the age of consent; where among the material allegations required to be proven by the state beyond a reasonable doubt, as set forth in other instructions, was the allegation as to her age. *State v. Herrington*, 636.

Same: Corroborating evidence: Instructions. The instructions in the instant case are held to fully state the rule that a conviction of rape can not be had on the testimony of the injured party alone, but that there must be other credible evidence independent of and corroborating that of prosecutrix, and tending to connect the defendant with the commission of the crime. *Idem*.

Same: Evidence. Evidence reviewed and held sufficient to sustain conviction for rape. *Idem*.

Same: Included offense: Instruction. Where a defendant is either guilty of the offense as charged or is not guilty at all there is no included lesser offense for submission to the jury. As where defendant was charged with rape upon a child under the age of consent, and the evidence was conclusive that the crime was vol-

CRIMINAL LAW Continued

unitary on the part of the prosecutrix, assault and battery was not an included offense. *Idem.*

Rape: Examination of prosecutrix: Leading questions. Reticence of a prosecutrix for rape in testifying to the details of the offense furnishes sufficient ground for permission to ask her leading questions. *State v. Dudley*, 645.

Evidence: Complaint of prosecutrix. Where it was apparent from the examination of prosecutrix that her statements concerning the offense had reference to defendant's intercourse with her, and none of the details were called for, evidence of such statements was not objectionable because not limited to a complaint. Nor did the mere fact that it was subsequently made to appear that her statements were made in response to questions, rather than otherwise, require the court to exclude the same, in the absence of a motion to that effect. *Idem.*

Same: Lapse of time. The lapse of two months between the time of an alleged rape and the complaint of prosecutrix will not render evidence of the complaint inadmissible. *Idem.*

Same. It is the natural impulse of a female upon whom rape has been committed to make known her wrongs, and her voluntary statements concerning the offense are not deprived of their character as complaints simply by the fact that they were made in response to inquiries, but her statements so made are receivable in evidence in corroboration of her credibility. The evidence of complaint in the instant case is held admissible. *Idem.*

Same: Physical condition of prosecutrix. Evidence of the physical condition of prosecutrix, although the result of an examination made some time after the alleged rape, is admissible. *Idem.*

Same: Corroboration. Evidence that another saw defendant in the room with prosecutrix shortly after the offense, and that prosecutrix was sitting on the bed with her clothing and hair in a disordered condition, together with plaintiff's admission of his presence, was sufficient corroboration. *Idem.*

Same: Unchastity. The possession by prosecutrix of an unsigned and unaddressed letter, suggesting sexual intercourse at a time prior to the alleged offense, was inadmissible to show that she was unchaste. *Idem.*

Evidence: Corroboration. Refusal of the court to eliminate by an instruction the admission of defendant that he was at the house of prosecutrix at the time of the alleged offense and had his boots

CRIMINAL LAW Continued

off, on the ground that it was not corroboration but merely evidence of opportunity, was proper. *Idem.*

EVIDENCE.

Dying declarations. Statements concerning the homicide made by a deceased *in extremis*, and in the belief that he had been mortally wounded, are admissible as dying declarations. *State v. Dyer*, 217.

Declaration by third party: Objections. Where a party has made no objection to the introduction of evidence upon the trial he can not complain thereof on appeal. In this case the state offered evidence in rebuttal as to a declaration by another concerning what an accomplice in the crime told him as to who had committed the offense; and while not admissible as substantive evidence yet the objection can not be raised for the first time on appeal. *State v. Finley*, 563.

Examination of witness: Discretion. The form of questions propounded to a witness and rulings on objections to the examination are largely matters of discretion with the trial court, and will not be interfered with on appeal unless an abuse of such discretion is shown. *Idem.*

INDICTMENT.

Sufficiency. Neither a failure of the clerk of a grand jury to include in the minutes of the evidence a statement that the witnesses were sworn before testifying; nor failure of the witnesses to sign the minutes of their evidence; nor failure of the clerk of courts to place a filing mark upon the sheets containing the minutes of the evidence, where the indictment to which the evidence is attached is marked filed, are fatal to the indictment. *State v. Ottley*, 329.

Same: Failure to file exhibits. Failure to file exhibits with the clerk of courts which were used before the grand jury is not ground for setting aside the indictment; nor will such failure render the exhibit inadmissible upon the trial. *Idem.*

Perjury: Indictment: Traverse of false statements. Perjury consists in the wilful and false swearing to a material matter; and both the indictment and the evidence must traverse the truth of the statements claimed to be false. In this action perjury is assigned on statements contained in a sworn notice of claim of ownership of property and the indictment fails to traverse the statements made by defendant in the notice. *State v. Hulsman*, 572.

CRIMINAL LAW Continued

TO

DRAINAGE

INSTRUCTIONS.

Evidence. A defendant in a prosecution for murder can not complain of an instruction given at his request, to the effect that if the jury find a certain witness to be the wife of the defendant no consideration is to be given her testimony, but if she was not his wife it should be given such weight as it was entitled to. State v. Watkins, 566.

Exceptions: Review on appeal. Where no exceptions are taken to the instructions given by the trial court they will not be reviewed on appeal. State v. Finley, 563.

Reasonable doubt: Sufficiency of proof: Instruction. The law does not require that every fact essential to conviction of a crime shall be separately considered, or proved beyond a reasonable doubt when considered separately; as the state is not required to divide its case into sections or to separate the essential facts and make each one stand alone; but every material allegation of an indictment is an essential fact and must be proven beyond a reasonable doubt, when considered in connection with the whole evidence in the case, to warrant conviction; and if upon a consideration of all the evidence in the case there is a reasonable doubt as to any one of such material allegations there can be no conviction. State v. Ottley, 329.

PRACTICE.

Continuance. Where it appears from the record that the time allowed defendant in which to prepare for trial was adequate for the full presentation of his defense, the court's discretion in refusing a continuance over the term for the purpose of preparing the case will not be disturbed on appeal. State v. Dudley, 645.

DAMAGES. See ATTACHMENT—MINES AND MINING—NUISANCE—REAL PROPERTY—SALES—WATERS.

DOWER. See ESTATES OF DECEDEDENTS—HUSBAND AND WIFE.

DRAINAGE. See WATERS.

Assessments for benefits. The fact that it may be necessary to lay more drains to render lands tillable will not release the land-owner from an assessment for the benefits arising from the drains as laid; it not appearing that his assessments are proportionately higher than those of other landowners. In this proceeding to confirm an assessment for drainage purposes the evidence is held

DRAINAGE Continued

to sustain an assessment of plaintiff's lands for substantial benefits already received. *Schropfer v. Hamilton County*, 63.

Drainage of surface water: Obstruction to natural flow. A railway company is bound to use ordinary care in filling a passage-way for surface water, usually and naturally flowing under its tracks, so as not to unnecessarily dam up and throw the water back onto an adjoining landowner, thus causing him unnecessary inconvenience and damage. *Tretter v. Chicago & G. W. Ry. Co.*, 375.

Drainage of surface water: Nuisance: Injunction. A city has no right to drain surface waters flowing into its streets into an unnatural water course and so as to cast it upon adjoining lands in a materially larger quantity and in a different manner than it would naturally flow, and not into a natural watercourse; but it has no greater duty in this regard than a private owner would have in protecting adjoining lands from such injury. And in exercising its power to make its streets passable it may provide for the passage of surface water in drains or culverts through or under the streets, and if the method adopted is reasonably suited for this purpose an abutting owner can not complain that he has not been relieved of the burden of drainage to which his land was already subject, although the improvement operates to some extent to his detriment.

In this action to enjoin a city from maintaining a tile drain across one of its streets, the evidence is held to show that the same discharged the surface water into a natural depression on plaintiff's land, and that the only effect of the drain or culvert was to discharge the water directly onto plaintiff's land in the natural depression, instead of allowing it to spread over the highway before reaching his land, and does not therefore constitute a nuisance which the plaintiff is entitled to have abated. *Cech v. City of Cedar Rapids*, 247.

Same: Prior adjudication. The finding of a jury in a prior action at law for damages, that the surface water was discharged through a street culvert constructed by the city into a natural depression on the plaintiff's land, is conclusive on that question in a subsequent action by plaintiff to restrain the city from maintaining the drain. *Idem*.

Obstruction to flow of surface water: Pleadings: Sufficiency: Appeal. A petition in an action for damages caused by obstructing the flow of surface water, which fails to allege interference by defendant or anyone else with the flow of the water in any manner, is insufficient; but where no objection to the pleading is

DRAINAGE Continued

TO

EQUITY

interposed on the trial and the same proceeds with acquiescence of the parties as though the pleading was sufficient in this respect, it will be so treated on appeal. *Hoppe v. Des Moines City Ry. Co.*, 580.

Street grades: Duty of adjoining owner. Where a city has not established a grade line for its streets an abutting property owner is not required to bring his lots to the existing grade to protect the same from overflow by surface water. *Idem.*

Street drains: Evidence. In this action for injury to abutting lots by overflow of surface water the questions of whether the damage resulted from unusual rainfall, and whether the tiles provided could reasonably be expected to carry the water across the street, were for the jury. *Idem.*

EASEMENTS. See REAL PROPERTY.

ELECTION OF REMEDIES. See CHATTEL MORTGAGES.

EQUITY.

Cancellation of instruments: Trusts: Quieting of title: Evidence. Where one in whose name title to property is taken furnished all or any definite part of the purchase price as his own and not by reason of an agreement with one claiming an adverse title, he is entitled to retain the same or have a resulting trust declared to the amount of the consideration which he furnished; but if, on the other hand, the party claiming adversely paid all or any part of the consideration personally, or by an arrangement with the holder of the legal title, he is entitled to have the deed set aside. In the instant case the plaintiff, seeking to cancel the deed in question, was an aged and ignorant man and the defendant, who held the legal title, was a man of affairs, and the evidence is held to show that the land deeded to defendant was paid for by plaintiff personally and by defendant in his behalf, and the plaintiff is entitled to have the deed set aside and title quieted in him. *Kirkpatrick v. Greenland*, 37.

Same: Evidence. The fact that one claiming to be the owner of property conveyed to another always had the possession of the same following the deed; that he made many payments therefor; paid the taxes and used the property as his own; that never until shortly before action to quiet title did the party holding the legal title claim the property under his deed; and that the parties agreed upon a division line or boundary between the land in question and that unquestionably owned by defendant, were strong cir-

EQUITY Continued

TO

ESTATES OF DECEDENTS

cumstances to support plaintiff's claim of ownership in this action.
Idem.

Specific performance: **Evidence.** To support a decree of specific performance of an alleged contract to convey land, the evidence of a binding contract must be clear and satisfactory. In the instant case the evidence is reviewed and held insufficient to establish an enforceable contract. *Kinman v. Botts*, 474.

ESTATES OF DECEDENTS. See **WILLS.**

Claims: Implied contract for compensation: Evidence. In proceedings for the establishment of a claim against an administrator on an implied contract to compensate the claimant, the facts implying the agreement must be so well established as to leave no room for conjecture, and when so established the law implies a promise to pay the reasonable value thereof; and the burden of proving that the claim is unpaid is not upon the claimant. In this case the claimant sought to establish a claim for care, board and lodging of the decedent, and the evidence is held to negative the administrator's contention that decedent had merely taken meals at claimant's house, without contemplation on the part of either that he should pay therefor. *Graham v. McKinney*, 164.

Same: Evidence: Transactions with a decedent. In an action against an administrator for board, lodging and care furnished decedent, the inquiries of claimant as to whether decedent roomed and boarded elsewhere and whether others rendered him similar service during his illness, were not objectionable, under the statute prohibiting a party from testifying to personal transactions with a decedent; but an inquiry as to what amount of board or care decedent required related to a personal transaction with him to which the plaintiff was not competent to testify. *Idem.*

Executors: Action upon bond: Judgment: Conclusiveness. In an action on the bond of an executor for failure to make a payment as directed by a judgment setting aside the approval of his final report, the court will not investigate the justice of the claim on which the judgment was based, in the absence of a plea of fraud or collusion in obtaining the judgment. *Tucker v. Stewart*, 294.

Same: Laches: Estoppel. The approval of an administrator's final report and his discharge stands as a complete adjudication of his account until the same is set aside by a direct attack in equity; as the correctness of the account can not be inquired into in a collateral proceeding. But when the approval of the report has

ESTATES OF DECEDENTS Continued

been thus set aside, and the administrator has failed to make restitution of money represented by an alleged fraudulent credit in his account, as directed by the court, an action therefor will lie against him and the sureties on his bond, when prosecuted promptly and in good faith. In the instant case laches as a ground of estoppel is not shown. *Idem.*

Same. Laches though sometimes available as a defense in equity have no place in an ordinary action for the recovery of a debt, unless prolonged for the full period of the statute of limitations. *Idem.*

Action upon executor's bond: Limitations. An executor's bond creates a continuing liability, each violation of which is a breach and furnishes a cause of action. So that while upon the approval of an administrator's final report an equitable cause of action may arise for the purpose of having the approval vacated on the ground of fraud in the account, which in the case of minor heirs or legatees, as in this case, will continue during minority and one year thereafter; so too upon a judgment in such an action vacating the approval of the report and disallowing an item in the account credited to the executor, with direction that he account for the same in money, an ordinary action then, and not until then, accrues in favor of such heirs or legatees against the executor and the sureties on his bond upon his failure to so account, and the statute of limitations does not commence to run against the latter action until that time. *Idem.*

Vacation of executor's final report: Parties: Notice. The sureties on an executor's bond are not necessary parties to an equitable action to set aside the approval of his final report on the ground of fraud in his account; and an order vacating the same without notice of the action in no manner affects their liability, since they are in privity with their principal and are presumed to have knowledge of all orders regularly entered relative to the settlement of the estate. *Idem.*

Executors: Fraud: Liability of sureties. An executor's bond is given to secure an honest and correct final accounting, and the approval of an account tainted with fraud or serious mistake, though operating for the time to prevent action on the bond, does not discharge all liability thereon; and when the report has been vacated for fraud liability of the sureties on the bond for the honest discharge of the trust by the executor is revived. *Idem.*

Dower: Assignment from a portion of the estate. The dower interest of a widow in the estate of her deceased husband may be

ESTATES OF DECEDENTS Continued

assigned to her from so much of one or more of the tracts of land as equals one-third in value of the entire estate, where her interest in the estate will not thereby be prejudiced. *Rice v. Rice*, I.

Same: Satisfaction of devise by subsequent conveyance: Assignment of dower. The conveyance to devisees by general warranty of lands theretofore devised to them is a satisfaction of the bequests, and the property passes to them under the conveyances rather than by the will, even though made by way of gift, subject only to the right of the widow's share therein; provided the same can not be assigned to her from the remaining estate lands without prejudice to her rights. And where it is made to appear that the widow can, without prejudice, take her share out of the remaining lands, she will be required to do so. *Idem.*

Same: Waiver of homestead right: Assignment of dower: Statute. The primary intent of the statute relating to the assignment of dower is to protect the widow by allowing her to continue in the use and occupancy of the homestead if she so desires, but she may waive this right and take her distributive share of the property, not including the dwelling house given by law to the homestead. She does not, however, have the right to absolutely dictate that portion which shall be set off to her regardless of the rights of others, that question being for final determination by the court, but she may indicate the arrangements which she prefers. *Idem.*

Assignment of dower: Apportionment in kind: Sale of property. Where it appears that the widow can properly be required to take her distributive share from lands of the estate not conveyed by the testator to certain heirs in satisfaction of bequests to them, but that such remaining lands can not equitably be apportioned in kind between the widow and the other heirs, the court instead of making a division of the property in kind should order a sale of the same, in whole or in part, as the best interests of the parties require. *Idem.*

Relinquishment of dower. A husband and wife may agree to unite their separate estates in the creation of a trust for the benefit of a third person, who shall come into the legal title and right on the death of the surviving testator; and where they execute a joint instrument clearly expressing such purpose, it will be treated as a relinquishment of any dower right in the property, whether termed a contract, will or conveyance. And where the will, as in this case, provided that the surviving testator should hold the same for life, and as such survivor the husband probated the

ESTATES OF DECEDENTS Continued

TO

ELECTIONS

same and enjoyed the benefits arising therefrom, he took simply a life estate, and a remarriage did not reinvest him with a heritable estate, in which his widow by the subsequent marriage could acquire a dower interest. *Baker v. Syfritt*, 49.

Legacies: Satisfaction. In this action the owner of land in both this and a foreign state conveyed the property in this state to plaintiff and other heirs, subject to the payment, on the grantor's death, of a legacy to his widow. Subsequently the grantor conveyed the land in the foreign state to plaintiff in trust, subject to a life estate in the grantor. Held, that upon the grantor's death there was nothing left in the property in the foreign state for his estate, and that no part of the proceeds arising therefrom should be applied to the legacy of the widow in satisfaction of the charge against the property in this state. *Douglass v. Lougee*, 406.

ELECTIONS.

Nomination of supervisors: Vacancies: How filled. A board of supervisors has power to divide the county into supervisor districts after the holding of a primary election and the nomination of supervisors; and where this has been done and prior thereto the nomination of a member of the board from the county at large was made, rather than for the district thereafter created, such nomination will not be treated as one for the district but a vacancy occurs to be filled by the proper authorities by a nomination for such district. *State v. Parker*, 69.

Mandamus: Placing of name of candidate on ballot. A proceeding by *mandamus* is the proper remedy to compel a county auditor to place the name of a candidate for office upon the official ballot. *Idem.*

Same: Certificate of nomination: Finality: Judicial review. Ordinarily a certificate of nomination issued by a board of supervisors must be regarded as final unless objections are thereafter filed; but where the board issued a certificate of nomination for the office of a member of the board of supervisors from the county at large, when as a matter of fact there was no such office to be filled, the board having divided the county into districts subsequent to the nomination and certification thereof, the certificate was not final so as to preclude the court from determining the rights of the parties to have their names placed upon the official ballot, although no objections thereto were filed. *Idem.*

Same: Judgment: Conclusiveness. A court has no power to

ELECTIONS Continued

TO

EVIDENCE

create an office by ordering that a name should go on the official ballot for that office; so that where one had been nominated for a member of the board of supervisors from the county at large and received a certificate of nomination, and the board subsequently and prior to the election divided the county into districts, thus abolishing the office of supervisor at large, a decree directing that the name of such person be placed on the official ballot for a supervisor at large was not conclusive of his right to hold the office of supervisor in his district, to which he had not been elected and for which he was not a candidate, although he received at the primary election a majority of the votes cast, both in the county at large and in such district. *Idem.*

ESTOPPEL. See AGENCY—CHATTEL MORTGAGES—ESTATES OF DECEASED—HUSBAND AND WIFE—INSURANCE.

Equitable estoppel. One invoking the doctrine of equitable estoppel must show that he had no knowledge of the facts relied upon as constituting the estoppel, and no convenient and available means of acquiring such knowledge; and where the facts are known to both parties or both have the same means of ascertaining the facts there can be no estoppel. *Logan v. Davis*, 441.

Same. The act of an officer of the land department in permitting one to urge his claim as a contract purchaser of railroad lands which had been forfeited, and of which he was not a good faith purchaser, and the subsequent issuance of a patent for the land to him, will not operate as an estoppel against the claim of a homestead entryman so as to preclude the entryman from questioning the validity of plaintiff's patent in a suit by him to recover the land. *Idem.*

EVIDENCE. In criminal cases, see CRIMINAL LAW. See also, ESTATES OF DECEDENTS—INTOXICATING LIQUORS—MINES AND MINING—RAILROADS—WATERS—WILLS.

Admissibility of documentary evidence. Books upon the subject of air brakes, purporting to give the distance at which trains moving at different rates of speed can be stopped by an application of the brakes, are not admissible in evidence to show such facts because not relating to any exact science; and further, because not revealing the conditions under which the tests were made: And aside from such objections the question of admissibility is within the sound discretion of the court. *Bruggeman v. Illinois Cent. Ry. Co.*, 187.

EVIDENCE Continued

Same. A memorandum, kept by a party in a book for that purpose, showing the terms of a contract and made in the presence of the adverse party, read over to him and acquiesced in by him is admissible in evidence for the purpose of showing the agreement, over the objection that it is not competent because not signed by the adverse party, and not a memorandum used to refresh the memory of the witness. *Tuffree v. Saint*, 361.

Harmless error. The admission of evidence bearing only upon matters concerning which no issue was submitted to the jury was not prejudicial. *Cox v. Cline*, 353.

Communication with a decedent. The statute relating to personal communications with a decedent precludes an heir of decedent from testifying to communications with him tending to sustain a conveyance of property by decedent to such witness. *Creveling v. Brown*, 45.

Credibility and weight: Direction of verdict. The credibility of a witness and the weight to be given his evidence are questions for the jury, and a verdict ought not to be directed by the court on the ground that his examination discloses a defective memory, or that he is seemingly untruthful. *Richards v. Watts*, 557.

Conversation by telephone: Identity of person talked with. The identity of a person speaking through a telephone may be established not alone by the sound of his voice, but from other circumstances as well; as, from the fact that he appeared at the telephone in response to a call for a person by his name, admitted that such was his name and was familiar with the transactions inquired about.

In the instant case the evidence of identity is held sufficient to take that question to the jury and to admit the testimony concerning the conversation over the telephone. *Cox v. Cline*, 353.

Expert evidence: Proof of patent laws. The patent laws of the United States are not the laws of a foreign country and are not therefore subject to proof by expert evidence. *Owen v. Natl. Hatchet Co.*, 393.

Exclusion of evidence: Harmless error. A party can not complain of the exclusion of evidence which is subsequently admitted. *Loxtercamp v. Implement Co.*, 29.

Exclusion: Prejudice. The erroneous exclusion of evidence which is subsequently admitted is not prejudicial. *State v. Dyer*, 217.

Prejudice: Waiver of objection. A party can not complain of the

EVIDENCE Continued

prejudicial character of evidence which he himself subsequently introduced upon the trial. *Duffey v. Block Coal Co.*, 225.

Prejudice. Various items of evidence in this case are referred to and held to be nonprejudicial. *Idem.*

Examination of witnesses: Discretion. The court has a discretion in the matter of the examination of witnesses; and where a party has rested his cross-examination, having had also the privilege of a re-cross-examination, the court may properly terminate the examination at that point. *Idem.*

Examination through an interpreter. The examination of a witness through an interpreter is largely a matter within the discretion of the trial court. The proper method, however, is for the interpreter to be impersonal, to require that all questions to the witness be in the second person, repeated by the interpreter without remarks of his own, and that the answers be repeated literally by the interpreter in the first person. The interpreter should act as a phonograph. *Gregory v. Chicago, R. I. & P. Ry. Co.*, 715.

Growing crops: Evidence of value. In an action for damage to crops, evidence as to the value of the crop should be confined to such a crop as plaintiff had.

It is also held that an exclusion of a price list which gave the same prices for growing plants that plaintiff had testified to was not prejudicial. *Tretter v. Chicago & G. W. Ry. Co.*, 375.

Hypothetical questions: Prejudicial remarks of court. Where the evidence was sufficient to support a hypothetical question it was error for the court to remark in the presence of the jury that the testimony did not show certain facts assumed in the question. *Bruggeman v. Illinois Cent Ry. Co.*, 187.

Hypothetical questions: Instruction. While all the facts stated in a hypothetical question must have support in the evidence, still it is not necessary that the question cover the whole case; and an instruction that the jury might disregard the testimony of experts to whom the question was propounded, unless it found that all the facts were covered by the question was erroneous. *Munier v. Michel*, 312.

Invasion of province of jury. Interrogatories calling for the very matters which it is the province of the jury to determine should be denied; as where the engineer of a train was asked whether he could by any possibility have stopped the train in a shorter distance, and whether it could have been stopped by any human

EVIDENCE Continued

TO

EXPRESS COMPANIES

agency in a shorter distance, as this was a vital issue in the case. *Bruggeman v. Illinois Cent. Ry. Co.*, 187.

Oral evidence: Admissibility. In this action one plaintiff seeks to recover for services performed under a claimed written substitute for a prior written contract voluntarily abandoned by him but conceded as binding if it had been carried out. Another plaintiff is attempting to recover on a written contract which by material alterations made by him was rendered invalid, if in fact they were executed so as to be binding. *Held*, that neither plaintiff can rely upon oral conversations preceding and referring to the attempted execution of the written contract, in the absence of a showing of fraud or imposition on the part of the defendant resulting in the failure to execute a binding written agreement. *Shea v. Cutler*, 366.

Pain and suffering. Complaints of existing pain of one sustaining an injury are admissible on the question of damages, and need not be confined to a time approximating the date of the injury. *Duffey v. Block Coal Co.*, 225.

Res gestae. To be admissible as part of the *res gestae* it is not necessary that the statements be made by a party to the action; nor is time of controlling importance under all circumstances. Thus in an action for injury to a child due to an explosion of gasoline, statements of the mother made a few minutes after the accident as to how it occurred were admissible as part of the *res gestae*. *Dubois v. Luthmers*, 315.

Of the certification and filing of evidence. The return and judge's certificate in a contempt proceeding for the violation of an injunction are conclusive as to the date of filing the evidence by the reporter, although his certificate shows that the same were filed on a different date. *Dermedy v. Jackson*, 620.

When not sufficient to create a conflict. Where an insured, as in this action, testified that he informed defendant's agent at the time he drew up the application for insurance that there was a mortgage on the property, the agent's testimony that he had no recollection that insured so informed him, and that his first knowledge of the mortgage so far as he could recollect was after the loss occurred, was not sufficient to create a conflict in the evidence and a directed verdict on that issue was proper. *Eckert v. Insurance Co.*, 507.

EXECUTORS. See **ESTATES OF DECEDENTS**.

EXPRESS COMPANIES. See **CARRIERS**.

FISH AND GAME

TO

HUSBAND AND WIFE

FISH AND GAME.

Shipment out of the state: Statute. A delivery of game to a common carrier for transportation to a point outside of the state, in violation of the code prohibiting the shipment of game out of the state, constitutes a shipment within the meaning of the statute, even though the game was taken from the carrier by state authorities while yet within the state. *State v. Carson*, 561.

FORGERY. See CRIMINAL LAW.

FRAUD. See CONTRACTS—ESTATES OF DECEDENTS—INSURANCE—NEGOTIABLE INSTRUMENTS—REAL PROPERTY—SETTLEMENT AND RELEASE.

GARNISHMENT. See ATTACHMENT.

GIFTS.

Gifts *inter vivos*: Evidence. In this action to establish a gift of land by deed, subsequent to the death of the grantor, the evidence is reviewed and held insufficient to show that the deed was intended to operate as a present delivery or as a consummation of the claimed gift. *Creveling v. Brown*, 45.

Transfer of title. Although a gift of property might not have been consummated prior to a delivery of the same to an express company for transportation to the consignee, under a contract made with him for shipment, the fact of such delivery for shipment operated to transfer the title. *Cox v. Express Co.*, 137.

GROWING CROPS. See EVIDENCE—REAL PROPERTY.

HUSBAND AND WIFE.

Alienation of affection: Malice: Evidence. A presumption of malice sufficient to support an action for alienation of affection does not arise from a mere showing, as in this case, that defendants were sorrowful and indignant and manifested ill will towards plaintiff when they learned of the fact that he had secretly married their daughter. *Corrick v. Dunham*, 320.

Conveyances by husband and wife to each other: Dower: Estoppel. Where the husband and wife join in the execution of deeds to their property, one to the other, for the purpose of making a division thereof, leaving the name of the grantee blank, but with authority to each to fill in the name of a purchaser and to deliver the same, with the full purpose and intent on the part of both to enable them to dispose of their respective land free from any

VOL. 147 IA.—50.

HUSBAND AND WIFE Continued

TO

INSTRUCTIONS

dower right of the other therein, and without any subsequent action by way of joinder in conveyances thereof, and this mutual understanding had been acted upon and carried out by both parties by completion and delivery of the deeds to purchasers, they are each estopped from thereafter asserting any dower interest in the land conveyed by the other. *Manatt v. Griffith*, 707.

Same: Statute. The statute which denies to the husband or wife the power to contract with the other in regard to the dower interest which each has in the other's property, does not prevent an estoppel from arising out of the subsequent acts of the parties in carrying out and completing an agreement for a relinquishment by each of a dower interest in the property of the other. *Idem*.

Same: Who may plead estoppel. The completion of a deed executed as above recited by filling in the name of a grantee designated as trustee and delivery of the instrument, the trustee at the same time executing an agreement contemplating a distribution of the property without the necessity of procuring a relinquishment of any contingent interest of the other spouse, and contemplating no compensation to the trustee in carrying out the trust, but obligating him to do so, is supported by a sufficient consideration to authorize the trustee to assert an estoppel of any claim to dower in the property by the other spouse. *Idem*.

HOMESTEADS. See **PUBLIC LANDS**.

Abandonment: Evidence. In this proceeding to sell real property claimed as a homestead to pay the debts of a decedent, the evidence is held to show that decedent, while occupying the property with a married son, left the same for a visit with relatives intending to return, but was prevented from doing so by reason of a personal injury from the effects of which he died, and that there was not an abandonment of the homestead. *Tyrrell v. Shannon*, 184.

INDICTMENT. See **CRIMINAL LAW**.**INJUNCTION.** See **DRAINAGE—INTOXICATING LIQUORS—MUNICIPAL CORPORATIONS**.**INSANITY.** See **CONVEYANCES**.

INSTRUCTIONS. In criminal cases, see **CRIMINAL LAW**. See also, **AGENCY—RAILROADS—REAL PROPERTY—WATERS**.

A requested instruction which singles out certain evidence without

INSTRUCTIONS Continued

TO

INSURANCE

regard to other evidence bearing upon the question, or which is purely argumentative, or which assumes as a fact a question concerning which there is a dispute in the evidence, should not be given. *Case v. Chicago G. W. Ry. Co.*, 747.

Statement of issues. Where the jury is plainly told that unless a certain defense is established the verdict should be for plaintiff, it was not error, in stating what was essential to make out such defense, to omit doing so in the alternative form. *Cox v. Kline*, 353.

Requested instructions. Where the court has given an instruction at the request of a party, using terms conjunctively, he can not thereafter require the court to give an instruction using such terms disjunctively, especially without first asking a withdrawal of the instruction given. *Gregory v. Chicago, R. I. & P. R. Co.*, 715.

When nonprejudicial. An instruction which requires of the successful party a stronger showing than is necessary for his recovery is not prejudicial to the defeated party. *Tuffree v. Saint*, 361.

INSURANCE.

Application: Negligence: Fraud: Estoppel. Where the agent of an insurance company fills out an application for insurance from information furnished by the insured, negligence can not be predicated on the fact that the insured signed the same without reading it. And knowledge concerning the condition of the property insured thus imparted to the agent will be imputed to the company, and will estop it from insisting on the invalidity of the policy because of a false statement in the application not attributable to the insured. *Eckert v. Insurance Co.*, 507.

Same: Breach of condition: Forfeiture: Estoppel. Failure of an insured to examine a policy issued to him and to return the same if the application attached is not in accordance with his statements, will not render the policy void or forfeit his rights thereunder; although failure so to do might estop him from claiming that his statements were incorrectly recorded by the agent who made out the application, if estoppel were pleaded. *Idem*.

Beneficial insurance: Death from "external, violent and accidental means." The term "external, violent and accident means," as used in a benefit certificate with reference to the cause of death, has reference to the unnatural or improbable consequence of the means which produced the death; thus, where a deceased died as the result of having swallowed a fish bone which lodged in the

INSURANCE Continued

intestines, causing inflammation of the parts and a wound producing death, although death resulted directly from blood poison, was accidental within the meaning of the certificate. *Jenkins v. Association*, 113.

Accidental death: Affirmative proof. Affirmative proof of death as the proximate result of external, violent and accidental means, has reference to such evidence of the truth of the matters asserted as tend to establish them, regardless of its character, so as to show *prima facie* that death occurred and that it resulted from the cause stated. *Idem*.

Same: Beneficiaries: Independent provisions: Validity of certificate. Although a benefit certificate names a beneficiary prohibited by the statute, still the certificate will not be held wholly void where there is another beneficiary named therein, under independent provisions, who is not within the prohibited class. In this action the certificate provides that if the insured received certain injuries resulting in death the association would pay a certain sum to a specified church, a beneficiary prohibited by the statute; and in case of injuries causing disabilities not resulting in death the insured should be paid stated weekly benefits, and it is held that although the church was not a person to whom a benefit could be made payable the certificate was not wholly void, since the provision for benefits in case of accident not resulting in death was valid. *Oliphant v. Health & Accident Assn.*, 656.

Same: Recovery of benefits. As the certificate was not wholly void and it provided that under certain conditions the association would pay the insured certain benefits, among which was a death benefit to be paid to a beneficiary named, if surviving, otherwise to be paid to the legal representative of the insured, and the designated beneficiary being within the prohibited class, there were no surviving beneficiaries within the meaning of the certificate, and the administrator of the insured was entitled to recover the benefit. *Idem*.

Limitation of liability: "Beyond seas." A policy of insurance limiting liability to injuries received within the United States, Mexico and Canada, and excluding parts of the United States beyond the seas, does not include liability for injury and death of insured in the Canal Zone on the Isthmus of Panama; as the Canal Zone is beyond seas within the meaning of the policy in suit. *Currie v. Casualty Co.*, 281.

Same: Waiver: Evidence. A waiver is the intentional relinquishment of a known right, and any conduct relied upon which war-

INSURANCE Continued

TO

INTOXICATING LIQUORS

rants the belief that a right has been relinquished constitutes a waiver in law; and the question of waiver is usually one of fact. In this action the questions of whether the policy sued upon was absolutely canceled, and whether the provision therein limited liability for injuries to places within the United States, is held under the evidence to be for the jury. *Idem.*

INTOXICATING LIQUORS.

Statutes: Prohibited acts: Effect of holding statute unconstitutional. Code, section 2382, as amended, prohibiting persons from soliciting or accepting orders for the purchase, sale, shipment or delivery of intoxicating liquors, was originally held unconstitutional by the Supreme Court of this state. Later the Supreme Court of the United States in another case declared the statute to be valid and our court subsequently followed that decision, overruling its own prior decisions.

Held, in this action that defendant could not be prosecuted for the doing of acts prohibited by the statute after it was declared invalid by our court and prior to the later determination holding the statute valid. *State of Iowa v. O'Neil*, 513.

What included: Beer: Statutes. The statute prohibiting the selling or keeping for sale of intoxicating liquors, has reference not only to liquor which is in fact intoxicating but also to other described liquors, whether intoxicating or not, such as beer and malt liquor. So that any liquor manufactured from malted grain by the process of fermentation, no matter how slight and without regard to the amount of alcohol actually contained therein, or whether in fact intoxicating, is within the statutory description of liquors the sale of which is prohibited. *Sawyer v. Botti*, 453.

Statutes: Enactment: Title: Subject matter: Description. The descriptive terms used to describe the subject matter of the various chapters of the code are not to be treated as titles to acts, within the constitutional provision that every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title. But the chapter relating to intoxicating liquor is one of several constituting Title Twelve of the Code, embracing the police powers of the state, and was enacted as one bill in the adoption of the Code, the title of which covered the entire subject matter of all the chapters therein. *Idem.*

Statutes. The legislature can not by statute make intoxicating liquor out of a beverage which is not in fact intoxicating, but

INTOXICATING LIQUORS Continued

may extend the prohibition of a statute relating to the sale of liquor to beverages not in fact intoxicating. *Idem.*

Same: Injunction: Attorneys' fees. Where, as in this action to restrain defendant from selling a malt beverage, defendant stopped the sale but litigated his right to sell, and but for an injunctive decree he might have resumed the sale, the court properly entered a final injunction against him and taxed attorney's fees in plaintiff's favor. *Idem.*

Former jeopardy. The seizure of liquor under a search warrant is primarily a proceeding against the property seized, the question being whether the same was owned or kept for sale in violation of law at the time of seizure and an adjudication that the same were not kept with intent to sell for wrongful purposes is not a bar to a prosecution for maintaining a place where intoxicants were illegally kept for sale prior to the time of such seizure. *State v. Dougherty*, 570.

Injunction: Scope of decree: Constructive notice. A decree restraining the sale of liquor in a certain place which in terms enjoins the defendant and all persons claiming through or under him, and all other persons, and the building as a place for the illegal sale and keeping of intoxicants, is sufficiently broad in its terms to prohibit all persons from maintaining a nuisance on the premises; and is sufficient as a public record to impart constructive notice to all persons. *Dermedy v. Jackson*, 620.

Injunction: Decree: Conformity with petition. A petition asking that a building be enjoined as a place for the sale or keeping for sale of liquor in violation of law, and such other relief as petitioner may be entitled to, is broad enough to support a decree enjoining defendants from using the building for the sale or keeping for sale of liquor, or permitting it to be done by persons under their control; and also to enjoin the building as a nuisance and as a place for the illegal keeping and sale of intoxicants. *Idem.*

Injunction: Evidence by depositions. The defendant in an action to enjoin the illegal sale of intoxicating liquors is not entitled as a matter of right to present his evidence in the form of depositions; as such right, if it existed, would generally result in postponing the trial over at least one term, which would violate the statutory provision that the action shall be triable at the first term after the service of notice. *Tuttle v. Pockert*, 41.

Same: Constitutional law. The section of the constitution pro-

INTOXICATING LIQUORS Continued TO **JUDGMENTS**

viding that the Supreme Court shall have appellate jurisdiction only in cases in chancery, and shall constitute a court for the correction of errors of law under rules prescribed by the General Assembly, does not provide that actions triable *de novo* shall be upon depositions; and hence, the defendant in a proceeding to enjoin the illegal sale of liquor is not entitled to present his evidence by depositions. And having no constitutional right to present his evidence by depositions, he is not entitled to a continuance of the temporary application for an injunction for the purpose of so presenting his evidence. *Idem.*

Nuisance: Abandonment of business: Injunction. Where the defendant in a suit to enjoin a liquor nuisance disposes of the property used in connection with the business, and quits the business pending the trial, there is no occasion for the issuance of an injunction, providing the court is satisfied that the defendant is acting in good faith in abandoning the business; but if the evidence of defendant's good faith is not satisfactorily established the court is justified in issuing the injunction notwithstanding the claim of abandonment. In the instant case issuance of an injunction was proper. *Tuttle v. Bunting*, 153.

Sale by corporation: Statutes. Under the present statutes an Iowa corporation may lawfully engage in selling intoxicating liquors under the provisions of the Mult Law. *State v. Delahoyde*, 327.

JUDGMENTS. See DRAINAGE—ELECTIONS.

Correction of same. The correction of a judgment entry so as to conform to the appellant's demand for recovery, although made subsequent to notice of appeal, will not necessitate a reversal of the case on that ground. *Citizens Nat. Bank v. Gardner*, 695.

Decree: Signature of judge. A decree of court in fact signed by the judge is not invalid because his signature is not accompanied with his official designation. *Dermedy v. Jackson*, 620.

Former adjudication: Conclusiveness. All issues of fact or law which are or might have been adjudicated in a former suit between the same parties are concluded by the judgment therein; but a former adjudication does not affect after acquired rights or claims which the parties had no opportunity to litigate. *Ross v. Dowden Mfg. Co.*, 180.

When appealable. While there must be an entry of judgment before an appeal can be taken, and a mere memorandum upon the judge's calendar or the filing of a written form of entry not in

JUDGMENTS Continued

TO

LANDLORD AND TENANT

fact spread upon the record is not a judgment or decree; still, an entry by the court upon the journal dated and signed by the judge, showing the commencement and conclusion of argument, decree granted for plaintiff as prayed, judgment against defendant for cost and that defendant excepts, is an appealable judgment, although the formal judgment or decree was not entered until after the appeal was taken. *Owen v. National Hatchet Co.*, 393.

JUDICIAL NOTICE.

Evidence: Pleadings. There may be causes of action so closely interwoven or so clearly interdependent that in the trial of one the court will take judicial notice of averments contained in the pleadings of the other action; but where the actions are entirely separate and independent the rule does not obtain: Thus in an action by a claimant of attached property on an indemnifying bond, the court will not take judicial notice of statements contained in the petition in the attachment suit. *Constantine v. Grupe Co.*, 142.

JURISDICTION. See APPEAL—JUSTICE OF THE PEACE.

JUSTICE OF THE PEACE.

Jurisdiction: Value. The defendant in this action, a resident of one county, ordered goods of plaintiff, a resident of another county, for which he agreed to pay a certain sum on delivery or give an approved note due one year, payable at the county of the seller, and containing a stipulation for attorney's fees and the jurisdiction of any justice of the peace. As by the terms of the agreement the defendant did not undertake to pay money or execute the note at the county of the seller, an action upon the contract could not be maintained before a justice of the county in which the seller resided. *Wayt & Son v. Meighen*, 26.

Same. Jurisdiction of a justice in an action for the breach of a contract to deliver goods at a specified place is not conferred by an implied promise to pay therefor at such place. *Idem.*

LACHES. See ESTATES OF DECEDENTS.

LANDLORD AND TENANT.

Sale of crop by tenant: Recovery by landlord. A landlord who predicates his right to recover for grain sold by the tenant, on the ground that the security of his lien for rent is impaired to that extent, may recover as for conversion against one who pur-

LANDLORD AND TENANT Continued TO**MARRIAGE AND DIVORCE**

chased and removed the same with notice or knowledge of his lien. *Rew v. Maynes*, 15.

Same: Construction of contract: Ownership of crop. Where the plaintiff, as in this case, contracted with the defendant to furnish him with teams and implements for raising a crop, and that the defendant should have possession of the land until the crop was harvested, should gather and deliver to the plaintiff the rent share of the crop, and that defendant should receive as pay for his labor the market price of a portion of the crop; it is held, that the contract was one of lease of the premises for a share of the crop as rent and that the crop was the property of the defendant subject to plaintiff's lien, under the rule that in the absence of a contrary agreement the product of the leased premises belongs to the tenant. *Idem*.

LIENS. See MORTGAGES.

LIMITATION OF ACTIONS. See TRUSTS—VENDOR AND VENDEE.

MANDAMUS. See ELECTIONS.

MARRIAGE AND DIVORCE.

Divorce: Cruel and inhuman treatment: Evidence. In this action by the wife for a divorce on the ground of cruel and inhuman treatment the evidence is held to justify a decree although actual physical violence was not shown. *Luettjohann v. Luettjohann*, 286.

Divorce: Support of child: Additional support: Change of circumstances: Evidence. A decree of divorce awarding alimony and the custody of a minor child is conclusive of the question of alimony, so long as the circumstances of the divorced party to whom the custody of the minor was awarded remains unchanged; and a supplemental proceeding for additional support of the child can not be maintained without a showing of change of circumstances requiring the same. The decree in question gave the custody of the child to the wife and required the husband to help support the child by specified monthly payments. In this proceeding for additional support it appears that the wife had become unable on account of illness to contribute as much towards its support as was contemplated when the decree was rendered, that illness of the child necessitated a larger amount for its support, and that the unwarranted conduct of the husband had deprived the wife of a source of her income. *Held*, that such a change in circumstances is shown as to authorize the court to grant additional alimony for the support of the child. *Peitzman v. Peitzman*, 704,

MASTER AND SERVANT

TO

MINES AND MINING

MASTER AND SERVANT. See NEGLIGENCE.**MINES AND MINING.**

Evidence: Custom: Harmless error. Where a coal miner was injured by being caught between a loaded car which he was riding and a rock protruding from the roof of the entry, and a witness testified that he had made a measurement of the height of the entry immediately after the accident, any error in permitting him to state that it was the duty and general custom of the pit committee, of which he was a member to examine the circumstances of an accident, and that his measurement was made for that reason, was not prejudicial; since the same was purely explanatory and in a sense personal to the witness. *Duffey v. Block Coal Co.*, 225.

Same: Contributory negligence. Evidence of the usual and customary method of performing work is competent on the question of the contributory negligence of one injured while performing the work. *Idem.*

Damages: Admission of evidence: Harmless error: Instruction. In this action to recover damages for the wrongful act of defendant in mining and appropriating coal under plaintiff's land, and for damage to a building situated thereon, it appeared that plaintiff had sold to defendant's grantor the coal underlying his farm, reserving the coal under one-fourth of an acre on which the building in question was situated, but that defendant disregarding the reservation mined and removed the coal from the reserved land.

Held, that as the court charged the jury not to consider as an element of damage the claim that there was no other suitable site on the farm for the building, because of the mining operations, and also limited the jury to a consideration of damages caused in mining the coal from the reserved land, and consequent injury to the building, the permission of evidence of the value of the land after mining the reserved coal, on the theory that there was no other suitable site for the building, was not prejudicial to defendant.

Held, also, that evidence of loss of value to the farm because of injury to the building site, and of loss of value to the farm on the theory that after the coal had been mined under the building site there was no other suitable site for the building on the premises, was inadmissible on the question of damages. *Stewart v. Coal Co.*, 548.

Same: Measure of damages. The measure of damages for wrong-

MINES AND MINING Continued

fully mining the coal in the reserved tract was the value of the coal immediately before the taking and removal of the same when considered in the light of its accessibility, the result of rightful mining operation under the contract of sale, and not the value of the coal in place regardless of facilities for removing the same afforded by the rightful mining operations, nor its value when brought to the surface and ready for market. *Idem.*

Same: Evidence: Trespass: Damages: Affirmance of ruling by equally divided court. Upon an equal division of the appellate court a ruling of the trial court will stand affirmed by operation of law. Under this rule the determination of the trial court that the allegations of plaintiff's petition were insufficient to permit evidence of wilful or negligent trespass by defendant in removing the coal from the reserved land, and of its value at the mouth of the mine, is sustained. *Idem.*

Exclusion of evidence: Harmless error. The exclusion of testimony is harmless error where the same witness is subsequently permitted without objection to detail the facts. Thus the exclusion of the evidence of an experienced miner who was a timberman in the mine when an employee was injured, to the effect that on the day of his injury he sounded the roof of the mine from which slate fell causing the injury and found that it was then safe, while erroneous was not prejudicial, in view of the fact that like evidence was subsequently admitted without objection. *Cotton v. Coal Mining Co.*, 427.

Same: Negligence: Assumption of risk: Instruction. Negligence is to be determined, not as an abstract proposition, but concretely as applied to the facts of a given case, and the test is, what would a reasonably prudent person have done under like or similar circumstances. In this action plaintiff was injured by the fall of slate from the roof of the mine in which he was employed, and he claims that the master had previously promised to remedy the defect in the roof. The court instructed that if such promise was made and if the danger was not great and constant, and that if a reasonably prudent person would have remained in the service, continuing to pass under the roof, such promise would relieve plaintiff from the charge of assumption of risk. *Held*, that the instruction was not prejudicial because failing to state the test of negligence to be what a prudent person who have done *under the same or similar circumstances*; there being nothing in the charge negativing the rule and the rule being correctly stated in other instructions, one of which referred directly to plaintiff's contributory negligence. *Idem.*

MINES AND MINING Continued

Same: Safe place to work: Duty to warn: Instructions. Where the evidence was such as to show that the duty to inspect the roof at the time plaintiff complained of its condition was not mutual, but that the master had or should have had knowledge of facts which plaintiff did not possess and was not bound to discover, such as the fall of slate on the morning of the accident of which plaintiff disclaimed any knowledge, an instruction that the law imposed upon the master the duty to use reasonable care to provide safe passage ways in the mine for workmen, and that if he failed to warn plaintiff of the danger incident to the condition of the roof such failure would constitute negligence was proper. *Idem.*

Same: Contributory negligence: Instruction. Where it appeared, as in this case, that plaintiff did not know that the mine entry having the defective roof in question had been closed, that other employees were using it, that it was the master's duty to inspect and repair the roof, that the roof to some extent had been propped up where the slate fell, and as plaintiff was entitled to show continued use of the entry by other employees, on the theory that it was an invitation to him to use it and an implied representation that it was safe, which facts were proper to be considered as bearing upon plaintiff's negligence although he did not know what particular employees passed through the entry at any given time, requested instructions to the effect that other employees passed under the defective roof shortly prior to plaintiff's injury should not be considered as bearing upon the question of plaintiff's negligence in using the entry because it was not clear that plaintiff knew that other employees had used the same, were properly refused. *Idem.*

Same. As it was not plaintiff's unqualified duty to inspect the roof in question before passing under it, instructions that if plaintiff could have ascertained whether the portion which fell was safe by inspecting the same before passing under it, and that if it was not more dangerous to tap the roof for the purpose of inspection than to pass under it without doing so he was negligent in failing to make the examination, were properly refused. *Idem.*

Same. As it was shown that plaintiff had informed the pit boss of a previous fall of slate and that he promised to place supports under the roof, and there was evidence that the same was done to some extent at the place where the slate fell injuring plaintiff, instructions that if there had been a previous fall of slate at or near that point of which plaintiff had knowledge, and if he knew the condition of the roof and upon inspection knew that the loose

MINES AND MINING Continued

TO

MORTGAGES

portion of the roof had not been taken down or supported, and the same fell causing his injury, he was negligent in going thereunder at the time of the accident without taking precautions for his safety, were also properly refused. *Idem.*

Contributory negligence: Evidence. It appears from the evidence in this case that plaintiff made complaint of the defective condition of the roof in the mine entry in question and that there had been a promise to remedy it, which was partially done, but that the entry was kept open without notice of danger; that the master claimed there had been a fall of slate from the roof on the day of the accident but plaintiff denied knowledge thereof. *Held*, that as the master was under a continuing duty to keep the roof safe, upon the performance of which duty the plaintiff had a right to rely, negligence of plaintiff in passing under the defective roof was not established as a matter of law. *Idem.*

MORTGAGES.

Absolute deed as a mortgage: Burden of proof: Evidence. To declare a deed absolute in form with covenants of warranty to be a mortgage, the evidence that it was given as security simply must be clear, satisfactory and convincing; the important questions being whether there was a continuing obligation on the part of the grantor to pay a debt which it is claimed the deed was made to secure; the relative value of the land as compared with the debt; how the parties treated the conveyance; the form of the written evidence of the transaction; and the character of the testimony relied on to show that the deed was accepted as security. In this action the evidence is held insufficient to sustain the plaintiff's contention that the deed in question was given merely as security. *Ridings v. The Marengo Savings Bank*, 608.

Transfer of property to mortgagee: Good faith purchaser: Assignment of mortgage. Where the original mortgagee subsequently acquires full title to the property by a conveyance from the mortgagor the transaction amounts to a release of the mortgage, and an innocent purchaser from the mortgagee will take the property free from the lien of the mortgage as against a previous unrecorded assignment of the same, and unaffected by the question whether he had actual notice of the outstanding mortgage or not. *James v. Newman*, 574.

Assignment of mortgages: Indorsement on margin of record: Constructive notice. To constitute constructive notice of the assignment and transfer of a mortgage the assignment transferring the same must be signed, acknowledged, recorded and properly

MORTGAGES Continued

TO

MUNICIPAL CORPORATIONS

indexed as required by statute. But granting that constructive notice of the assignment thereof may be afforded by a notation of the transfer on the margin of the record of the mortgage, the burden rests upon one claiming under the assignment to prove the same in the same manner as other written instruments of evidence are proven, and to show that it existed upon the record prior to a transfer of the property to a good faith purchaser. *Idem.*

Priority of liens: Contracts for compounding offenses. In this action two commission men guilty of fraud in selling the cattle of an owner at less than he was to receive, agreed to pay the owner the value of the cattle and an additional sum as expenses in settlement of his claim, each to pay one-half thereof. A third party borrowed the money necessary to make the payment and received a note and mortgage from one of the commission men to pay the amount which he was to furnish, and arranged with others for the payment of the loan. *Held*, that the notes and mortgage were the absolute property of such third person and not held by him as collateral, and that his mortgage was superior to a junior mortgage.

It is also held that the agreement for settlement was not within the provisions of the code prohibiting an agreement to compound or to conceal an offense or to abstain from a prosecution thereof. *Bank v. Collins*, 107.

MISCONDUCT. See NEW TRIAL.

MUNICIPAL CORPORATIONS. See NUISANCE.

Counties: Division into supervisor districts: When order becomes effective. The order of a board of supervisors dividing a county into supervisor districts takes effect immediately upon the making of the order. *State v. Parker*, 69.

Townships: Employment of counsel by trustees: Compensation: Statutes. There is no express statutory authority for township trustees to pay out township funds for attorney's fees in defense of an action to enjoin the work of draining a highway and otherwise improving the same. Nor have they implied authority to employ attorneys in such cases and to pay for their services from the general fund, or to levy a tax to meet such expenses. As there is a statute for the payment of attorney's fees in certain actions against township trustees and authorizing the levy of a tax to meet the same, the rule obtains that in cases not enumerated in the statute the trustees have no such authority. *Davis v. Laughlin*, 478.

MUNICIPAL CORPORATIONS Continued

Ordinances: Licenses: Sale of dairy products: Inspection of dairies: Statutes. Municipal corporations can only exercise such powers as are expressly granted by statute, or such implied powers as are necessary to render available the powers expressly conferred and essential to carry out the purposes of the corporation; and these powers are to be strictly construed.

In the instant case the statutes are reviewed, and it is held that neither the statutes nor the rule of the State Board of Health authorize a city, either expressly or by implication, to adopt an ordinance requiring that dealers in milk and cream procure a license, or to require an inspection of dairies or dairy cattle. *Bear v. City of Cedar Rapids*, 341.

Same. Power of a city to require a license of milk dealers is not to be implied from power to punish by a fine or to regulate the milk business; nor does such implied power exist by reason of the fact that the state itself has attempted to regulate the matter and has provided for licensing the business. *Idem*.

Same: Constitutional law: Uniformity of operation: Delegation of power. Even had a city such power the ordinance in question vests a discretion in the city Board of Health to arbitrarily grant or refuse a license, thus destroying the guaranty of equal opportunity, and is an unlawful delegation of power. *Idem*.

Injunction: Restraint of void ordinance. A milk dealer affected by a void ordinance requiring all persons selling milk to procure a license after inspection of the dairy at the dealer's cost, and imposing penalties for its violation, may enjoin the enforcement of the ordinance. *Idem*.

Cities: Streets: Abandonment: Estoppel. Where a town was incorporated several years after the construction of a building extending several feet into the street as platted, and for a period of thirty years thereafter made no objections to such occupancy of the street, but improved the street during that time with reference to the building as being located upon the lot line, it will be presumed to have accepted the street as extending only to the building, or to have abandoned the portion occupied, and is estopped from thereafter asserting title to the same. *Duetzmann v. Kuntze*, 158.

Same: Necessary parties. The town in this case was not a necessary party to the suit to rescind the contract, although the action involves a determination of whether the vendor by long possession and abandonment by the town had acquired title to that part of the property conveyed which was originally in the street; as that ques-

MUNICIPAL CORPORATIONS Continued

tion is determinable without prejudice to the rights of the town. *Idem.*

Street improvements: Advertisement for bids. In this action to enjoin the defendant city from paying a claim for a street pavement where it was contemplated that the new pavement should be laid upon the existing concrete foundation, and the advertisement for bids so stated and that the improvements were to be according to plans and specifications which required the old foundation to be brought to subgrade, and that the new concrete necessary for resurfacing the old foundation be measured in a manner satisfactory to the city engineer, and that separate bids be made for new paving on the old foundation and for extra concrete, the advertisement sufficiently showed that the extra concrete was to be placed on the old foundation to bring it to subgrade. *Fullerton v. City of Des Moines*, 254.

Same: Compensation for public improvement: Prior adjudication. The fact that prior to the institution of this action to enjoin defendant from paying a claim for street improvement property owners had instituted actions to enjoin the improvement, on the ground that the street grade would be lowered by the proposed improvement, which actions were dismissed for the reason that the specifications for the new work required the contractor to bring the surface to subgrade as a part of the new improvement, did not go to the question of whether the contractor was to receive extra compensation for bringing the street to grade and were not an adjudication of that question in this action. *Idem.*

Same: Compensation: Extras. Where a contract for paving a street with asphalt exacted first the laying of concrete on the old foundation to bring the surface to subgrade, and provided that there should be no compensation for extras, the laying of the concrete, an essential portion of the work for which separate bids were received, was not extra. *Idem.*

Same: Contract for public improvement: Reformation. Where all the negotiations for paving a street on the old foundation with asphalt, and bringing the foundation to subgrade with additional concrete, were on the theory that the necessary concrete was not determinable at the letting of the contract; that compensation therefor should be fixed separate from that for laying the asphalt; and the resolutions, proposals and specifications were in harmony with such a course and bids were invited with the understanding by all parties that separate prices were to be paid for grading the foundation and laying the asphalt, but in making the contract the intention of the parties in this respect was not

MUNICIPAL CORPORATIONS Continued

expressed, the court had power to reform the contract to give it the effect intended; and it is no objection to such power that one of the parties was a municipal corporation. *Idem.*

Same. A city may treat its contract for a public improvement as already having been reformed to conform to the real intent of the parties, and it may allow a claim for extra compensation on such basis and thus avoid the expense of litigation incident to the reformation. *Idem.*

Public improvement: Discretion of council: Review. The discretion reposed in a city council to determine whether public interest requires the improvement of streets and alleys is not open to judicial review, in the absence of some showing of fraud or oppression. *Collins v. City of Keokuk*, 233.

Same: Contracts for public improvement: Filing of the same. The statute requires the filing of a contract for making a public improvement with the city clerk prior to the commencement of the work; but where it appears that the work was done under a contract, mere failure of the clerk to discharge his ministerial duty to file the same will not render the contract void if in fact duly made. *Idem.*

Same: Cost of improvement: Payments. A city's portion of the cost of paving an alley is properly payable out of the city's general revenue. *Idem.*

Same: Ordinances and resolutions: Signature of mayor. Although the statute requires that ordinances and resolutions of a city council shall be signed by the mayor before they shall take effect, except under certain conditions; still, where a city is acting under a special charter which provides that such city may have a president *pro tempore*, to be regularly chosen each year, whose duties are to preside at sessions of the council in case of the sickness or temporary absence of the mayor, and for the time being to perform the duties and functions of the mayor, his signature to a resolution of necessity for a public improvement, passed during the illness of the mayor, was sufficient. *Idem.*

Same: Objection to assessment: Injunction: Waiver of objection. Objection by a property owner to the regularity and sufficiency of the primary steps taken by a city council, in ordering a public improvement and making an assessment for the cost, must be taken advantage of by objections filed with the city council and an appeal from its adverse ruling; such objections, not going to the question of jurisdiction of the council to proceed to levy

MUNICIPAL CORPORATIONS Continued to**NEGLIGENCE**

or enforce the assessment, can not be made the basis of a suit to enjoin the assessment. And where a property owner appears before the council and objects to certain irregularities in the proceedings, which objections are overruled, he can not thereafter raise such questions in a suit to enjoin the assessment. *Idem.*

MURDER. See **CRIMINAL LAW.**

NEGLIGENCE. See **INSURANCE—MINES AND MINING—NUISANCE—RAILROADS—WATERS.**

One who is confronted with a sudden peril is not necessarily negligent in taking the more dangerous of two or more avenues of escape. *Bruggeman v. Illinois Cent. Ry. Co., 187.*

Definition. An instruction that negligence consists in doing something which a person of ordinary prudence and care would not have done or would not have omitted to do under the same or similar circumstances, while not as clear a statement as might be made, is not on that account reversible error. *Dubois v. Luthmers, 315.*

Sale of gasoline: Evidence: Inconsistent statements. In this action for personal injury to a child, the result of an explosion of gasoline claimed to have been negligently sold and delivered to plaintiff as kerosene in a can not intended for gasoline, plaintiff's father had testified to having a can about his place and that immediately after the accident he sent it back to the defendants, that he had himself previously purchased gasoline which was put in the can and that the can was painted red. There was also evidence tending to show that the can was not sent back but was in possession of the family the day following the accident and that it had lettering on it as required by the statute *Held*, that evidence of a conversation between the father and defendants shortly after the accident, to the effect that he did not blame defendants, as he had a gasoline can, was admissible. Held also that it was competent to show that on the day following the accident members of the family were seen in possession of a gasoline can properly painted and lettered; and that the declarations of those in possession of the can as to what they were going to do with it were admissible, as verbal acts explanatory of their possession. *Idem.*

Contributory negligence: Evidence. In an action for injury to a servant evidence of the extent of his service and experience in the work is admissible on the question of contributory negligence; but where it conclusively appeared that the servant was doing

NEGLIGENCE Continued

the particular work for the first time on the day of his injury, error in excluding evidence of his previous experience in that work was not prejudicial. *Gregory v. Chicago, R. I. & P. R. Co.*, 715.

Master and servant: Assumption of risk: Pleading: Instructions.

In personal injury actions the assumption of ordinary risks incident to plaintiff's employment need not be specially pleaded; but where the assumption of risk has reference to that arising out of the negligence of the master, when such negligence is known to the employee and the danger is appreciated by him, it is incumbent on the defendant to plead the same as an affirmative defense, and when not so pleaded the court is not required to instruct on the subject. *Duffey v. Block Coal Co.*, 225.

Master and servant: Safe place to work: Duty of master: Delegation of duty. It is the duty of the master to provide a servant with a reasonably safe place in which to work, and this duty can not be delegated; and, as in this case, the owner of a building is liable for injuries to his servant resulting from the negligence of an independent contractor in failing to properly fasten a fire escape to the building. *Winslow v. Building Co.*, 238.

Same: Negligence of master: Fact question. The question of whether the master in the instant case might have discovered that the fire escape was not properly fastened to the building, and have remedied the defect prior to the accident to plaintiff, was for the jury. *Idem.*

Same: Negligence: Assumption of risk. The mere fact that from a superficial view the fire escape appeared to plaintiff to be firmly fastened to the building was not sufficient, as a matter of law, to relieve the owner from liability for plaintiff's injuries resulting from the negligence of the contractor in fastening the same.

Master and servant: Safe place to work: Liability for acts of fellow servant. The master is not liable to one servant for the negligence of a fellow servant, especially where they are engaged in the same common employment. Ordinarily his duty in the first instance is discharged by furnishing a reasonably safe place to work, a sufficient number of competent employees, the necessary appliances and proper materials; but he is under a continuing duty to inspect and keep the place reasonably safe and to establish rules and precautions for doing the work. *Hamm v. Bettendorf Axle Co.*, 681.

Same: Negligence: Duty to warn: Delegation of duty: Evi-

NEGLIGENCE Continued

TO

NEGOTIABLE INSTRUMENTS

dence. It is the duty of the master to warn an employee of dangers arising out of the progress of the work known to the master but unknown to the employee; and even though the employer is not under obligation to discover danger, still if he is informed of the same his duty to warn and use ordinary care for the safety of an employee arises. And this duty can not be delegated so as to relieve the master from liability for failure to perform the same, but the negligence of a foreman in this respect, in charge of the work, is the negligence of the master.

In this action plaintiff was injured by the fall of a pile of iron or steel plates upon which he was at work, and the evidence shows that the same were so piled as to be likely to fall; and there was testimony to the effect that the foreman directly in charge of plaintiff's work was warned of this fact while the pile was being made but gave the matter no attention, and it is held that the evidence of the foreman's negligence was sufficient to support a verdict for plaintiff. *Idem.*

Same: Assumption of risk: Burden of proof: Instructions. In an action for injuries to a servant the master has the burden of proving an assumption of the risk growing out of the negligent performance of his duties. *Idem.*

NEGOTIABLE INSTRUMENTS.

Bills and notes: Consideration. A failure to properly execute a collateral agreement as a consideration for which notes are given does not necessarily render the notes, when properly executed and delivered, void for want of consideration. *Owen v. National Hatchet Co.*, 393.

Action upon note: Consideration: Instruction. In this action a divorced husband is seeking to recover on a renewal note given by his wife for a balance claimed to be due in consideration of a relinquishment of his claim to property in her name, and for refraining from contesting the divorce. *Held*, an instruction that if defendant obtained a divorce it is presumed that it was lawfully granted on sufficient evidence, and that plaintiff's promise not to resist the action for divorce constituted no part of the consideration for the note, and that neither partial payment on the note in suit nor the fact that it was a renewal would impart or establish a consideration therefor, was proper. *Robinson v. Robinson*, 615.

Same: Renewal note: Consideration. Where a promissory note is treated by the parties either as valid or as questionable, and

NEGOTIABLE INSTRUMENTS Continued TO **NEW TRIAL**

for the purpose of securing an extension of time to avoid litigation and settle the rights and obligations of the parties a new note is given, such renewal note is supported by a valid consideration. Under the evidence it is held that the question of whether defendant gave the note in suit to avoid litigation and to settle the supposed or claimed rights of the parties was for the jury. *Idem.*

Fraud in execution of the same. Where signatures to a contract for the joint purchase of property, and to a joint note given in settlement therefor, were procured in reliance upon the genuineness of the signature of the first signer and his joint interest therein and liability therefor, but who was subsequently released from liability on the note according to a previous arrangement with him, a fraud was committed upon his associates and the note was thus rendered unenforceable in the hands of the original payee. *Cox v. Cline*, 353.

NEW TRIAL.

Discretion: Review. The appellate court is slow to interfere with an order granting a new trial, in view of the trial court's discretion in that regard; and the mere fact that a party was not entitled to a new trial because there was no prejudicial error, and because on the whole record the other party was entitled to a directed verdict, will not necessarily require a reversal of the order. *Royer v. Plaster Co.*, 277.

Inconsistent instruction. An instruction which is inconsistent with itself is presumptively prejudicial and is sufficient to justify the court in granting a new trial. *Idem.*

Same. The appellate court will not set aside an order for a new trial made after a verdict for defendant, because of instructions prejudicial to plaintiff, on the ground that the court also erred in not directing a verdict for defendant; as both errors taken together would not render each nonprejudicial. *Idem.*

Misconduct in argument. Although the argument of counsel for the state that the death penalty ought to be imposed because in the event of life imprisonment there was a probability that defendant might be paroled or pardoned, while improper, was not ground for reversal in this case, because under the record there was no reasonable probability that the verdict would have been otherwise had the objection to the argument been sustained. *State v. Junkins*, 588.

NEW TRIAL Continued

TO

NUISANCE

Impeachment of verdict: Affidavits of jurors. Affidavits of jurors to the effect that they considered evidence of prosecutrix' complaint as tending to identify defendant as the person who committed the rape, in the face of an express instruction of the court not to do so, were properly stricken, for the reason that jurors are not thus permitted to impeach their own verdict, even though they may have misunderstood the instruction. *State v. Dudley*, 645.

Same: Misconduct of juror. The mere fact that one of the jurors spoke to prosecutrix during the trial, simply passing the time of day, was not prejudicial to defendant. *Idem*.

Same: Misconduct in argument. A defendant in a criminal action may rely on the presumption of his good character, which always obtains in the absence of evidence to the contrary, and remain silent on the subject; and where this is done and defendant offers no evidence of his good character, it is improper for counsel in argument to state that the law gives him the right to show his good character and that they have a right to infer that he would have done so if he could; and where, as in this case, the court overruled an objection to the argument it became especially objectionable. *Idem*.

Same: Amendment to motion or petition: Jurisdiction. After entry of judgment and the taking of an appeal the trial court has no jurisdiction to hear either an amendment to a motion or a petition for new trial. *Idem*.

Verdict. Where there is evidence to sustain the verdict in the amount rendered, the fact that a larger verdict might have been found under the evidence, is not ground for a new trial. *Rueber v. Negles*, 734.

Same: Appeal: Entry of judgment. Where there was no error entitling defendant to a new trial the action of the court in increasing the amount of the verdict will not authorize a new trial, but the appellate court may remand the case with direction to enter judgment on the verdict as returned by the jury, the appellee not asking for a new trial. *Idem*.

NOMINATION OF OFFICERS. See ELECTIONS.

NUISANCE. See MUNICIPAL CORPORATIONS.

Abatement: Pleading. An individual citizen can not abate a public nuisance unless he shows some injury or prejudice peculiar to himself and other than that suffered by the inhabitants generally. *Collins v. City of Keokuk*, 605.

NUISANCE Continued .

TO

OATH

Same: Action to compel tax levy: Pleading. Nor can he compel a levy of municipal taxes unless he shows some special injury by failure to make the levy, and that the municipality at large will suffer from the omission. *Idem.*

Permanent and continuing injury: Recovery of damages: Election. In an action for damages growing out of a permanent nuisance the plaintiff may elect whether he will treat the injury as permanent and recover all his damages in one action, or as continuing and recover therefor in successive actions; but where he has treated the injury as permanent and has recovered his entire damages he can not thereafter maintain an action for continuing injury. *Risher v. Acken Coal Co.*, 459.

Same: Measure of damages. Where a nuisance and consequent injury are distinctly permanent in character the measure of recovery is the decrease in the value of the injured property on account of the nuisance. *Idem.*

Same: Contributory negligence. The doctrine of contributory negligence is not applicable to nuisance cases, as the nuisance itself is not necessarily occasioned by negligence. In this action the nuisance complained of was a dirt dump from a coal mine far removed from plaintiff's property at the time he purchased, but was subsequently carried by defendant to within a short distance of his property which made it in fact a nuisance. *Idem.*

Same: Evidence. Evidence in this action that plaintiff had consented to the use of other ground for a dump was not prejudicial to defendant, since, if untrue, he might have shown that fact. *Idem.*

Same: Damages: Instruction. Evidence of difference in the rental value of plaintiff's premises because of the nuisance is held not to have been prejudicial, in view of the court's instruction that the decrease in the value of plaintiff's property was the measure of recovery, which excluded the question of rental value. *Idem.*

OATH.

Form of. There is no statutory form of an oath and any form thereof which is calculated to appeal to the conscience of the person to whom it is administered and by which he signifies that his conscience is bound is sufficient. Omission from the oath of the words, "So help you God," is immaterial. *State v. Hulsmann*, 572.

OFFICERS

TO

PARTIES**OFFICERS.** See **ELECTIONS.**

Prosecuting attorney: Removal from office. A prosecuting attorney has some discretion in instituting and conducting criminal prosecutions, and he can not be removed from office for misconduct in that respect without a showing of abuse of such discretion, or a clear showing of corruption or incompetency. *State v. Hospers*, 712.

Same: Official misconduct: Evidence. In this proceeding to remove a prosecuting attorney for wilfully neglecting to institute certain prosecutions, the evidence is held insufficient to show official misconduct. *Idem.*

ORDINANCES. See **MUNICIPAL CORPORATIONS.**

PATENT RIGHTS.

Patents: Presumption as to validity. There is a presumption in favor of the regularity and validity of a patent issued by the government. *Owen v. National Hatchet Co.*, 393.

Same: Rescission. The fact that the purchaser of the right to sell a patented article in a specified territory paid too much therefor is not ground for rescission of the contract, in the absence of fraud. *Idem.*

License to use same: Liability for royalties. A final adjudication declaring a patent invalid relieves a licensee from liability for royalties claimed after he repudiated the license, and prior to the adjudication; but so long as the licensee recognizes the right to use the patent and acts thereunder, he is liable for royalties accruing under his contract with the patentee therefor. *Ross v. Dowden Mfg. Co.*, 180.

Same: Failure of consideration. An invalid patent creates no right in favor of the patentee against one who in no manner recognizes its validity or a license to use it, and will not furnish any protection to a licensee thereunder, and hence there is a failure of the consideration for a contract to pay royalties. *Idem.*

PARTIES.

Misjoinder of parties: Waiver of objection. An original misjoinder of parties defendant is immaterial where, after amendment bringing in proper parties, all of such defendants voluntarily answer. *Constantine v. Grupe Co.*, 142.

PAYMENT

TO

PRACTICE**PAYMENT.** See **VENDOR AND VENDEE.****PERJURY.** See **CRIMINAL LAW.****PLEADINGS.** See **REPLEVIN—SALES—VENDOR AND VENDEE.****Amendment.** A petition may be amended without leave of court prior to the filing of an answer. *Jenkins v. Association*, 113.**Demurrer: Amendment: Motion to strike.** Where a demurrer to a petition was sustained and the defendant moved to strike an amended petition on the ground that it did not obviate the ruling on the demurrer, the court if convinced that a mistake was made in sustaining the demurrer could set aside the order and overrule the same, and the real question thus presented by the motion was the sufficiency of the petition with the amendment. *Blackett v. Ziegler*, 167.**Assignment of cause of action: Admission: Evidence.** A general denial in answer to a petition setting out a copy of a written assignment of the cause of action is an admission of the genuineness of the signature to the assignment but nothing more. And to authorize recovery by the assignee a delivery of the assignment must be shown, and this is ordinarily done by introducing the instrument in evidence. *Hoppes v. Des Moines City Ry. Co.*, 580.**Motion to strike: Prejudice.** Where a party is entitled to recover under the pleadings and proof as made, error in ruling upon a motion to strike parts of the pleadings is not prejudicial. *Jenkins v. Association*, 113.**Rescission: Waiver: Appeal.** To render fraud in the execution of a note given for the purchase price of property a complete defense to an action thereon, rescission of the contract should be pleaded; but where the action was tried on the theory of rescission and without objection to evidence bearing thereon because rescission was not alleged, and the plaintiff requested an instruction on the theory that rescission was an issue, there was a waiver of the defect in pleading, and the omission can not be urged on appeal as a ground of reversal. *Cox v. Cline*, 353.**PRACTICE.** See **APPEAL.****Oral argument.** Counsel have no absolute right to orally argue a matter which is for the consideration of the trial court; and failure to give opportunity for oral argument in resistance to a motion to strike, or for a more specific statement, is not reversible error. *Barnes v. Savings Bank*, 267.

PRACTICE Continued

TO

RAILROADS

Verdict: Inadequacy: Correction by the court: New trial.

Where the jury is instructed to return a verdict for plaintiff in a specified sum, or nothing, but the verdict is in fact rendered for a less sum than directed, the court has authority simply to set the verdict aside subject to the condition that defendant submit to the larger verdict or to a new trial; a verdict for a less sum than that authorized can not be corrected by the court arbitrarily. Rueber v. Negles, 734.

PUBLIC LANDS.**Railroad grant: Good faith purchaser: Evidence: Statutes.**

In this action the plaintiff is seeking to establish his title to unearned railroad land, and to which the railroad company never acquired title, under the Act of Congress providing that citizens of the United States who were good faith purchasers from a railroad company of lands erroneously certified or patented to it should be entitled to purchase the land of the government, as against the defendant who had taken possession of the land as a homestead entryman. Upon a review of the evidence it is held that plaintiff was not a good faith purchaser within the meaning of the Act of Congress.

It is also held that the Act of Congress in question does not apply to unearned lands purchased after the date of the Act. Logan v. Davis, 441.

Equitable title: Notice. The plaintiff in this action at the time he secured his claimed interest in the land in controversy, having had actual notice of a hostile and superior title, acquired no equitable title to the property in himself. *Idem.*

Same: Homestead entry: Trespass. The defendant in this action entered upon certain public lands at a time when it was not subject to public entry, invading at the time the actual but wrongful possession of plaintiff. Subsequently the land became subject to entry and defendant continued to occupy it without protest, filing thereon a homestead claim, until it was erroneously patented to plaintiff. *Held*, that as defendant had been for several years in peaceable and uninterrupted possession his homestead claim made in good faith was not subject to the objection that his original possession was obtained by trespass. *Idem.*

RAILROADS. See CARRIERS.

Crossing accident: Signals: Negligence: Instruction. The statute requiring a sounding of the engine whistle and ringing of

RAILROADS Continued

the bell on approaching a highway crossing, while not applicable to street crossings within the limits of cities or towns, so far as sounding the whistle is concerned, does apply in both respects when the train is approaching a crossing within an unincorporated village; so that where a crossing accident happens in an unincorporated village, and one of the grounds of negligence alleged is failure to give the statutory signals on approaching the crossing, the jury should be fully instructed with relation to the statutory signals. *Bruggeman v. Illinois Cent. Ry. Co.*, 187.

Same: Crossing signals: Rate of speed: Instruction. In an action for the negligent operation of a train over a highway crossing, grounded both upon failure to give statutory signals and excessive rate of speed, an instruction that the speed of the train would not of itself constitute negligence but might be considered in determining whether reasonable and adequate signals were given, together with the other proven facts bearing on that issue, was insufficient, because presenting but one side of the question; since it eliminated consideration of speed as a ground of negligence, except as bearing upon defendant's negligent failure to give adequate signals. *Idem.*

Same. Where excessive speed is made a ground of negligence in approaching a highway crossing and the evidence supports the issue, an instruction confining the jury's consideration to defendant's alleged negligence in failing to give adequate signals is erroneous. *Idem.*

Same: Contributory negligence. An instruction requiring plaintiff in a personal injury action, as a condition precedent to recovery, to show himself absolutely free from all negligence is erroneous, because requiring too great a degree of care on his part. *Idem.*

Same: Duty to stop, look and listen: Degree of care required. The rule requiring one approaching a railway crossing to stop, look and listen for an approaching train exacts of him reasonable care in so doing; and an instruction that it was plaintiff's duty to use ordinary care under all the circumstances to stop, look and listen at such reasonable places as would best enable him to discover an approaching train was erroneous, because requiring of him an exercise of the highest degree of care in selecting the best places for observation, instead of ordinary care.

And an instruction that if plaintiff could have seen the train in time to have avoided the accident by an exercise of ordinary care, and did not do so, was erroneous as plaintiff was not necessarily

RAILROADS Continued

negligent because the danger might have been seen and avoided. *Idem.*

Same: Last clear chance: Instruction. It is not essential to an application of the doctrine of the last clear chance that plaintiff's negligence should have ceased before the accident, in order to recover under that doctrine: So that even though the plaintiff, in a personal injury action, was negligent in putting himself in a place of danger and in remaining there down to the very time of the accident, still, if the defendant knew of plaintiff's danger in time to have avoided the injury by exercising reasonable care, it would be liable for failure to exercise such care under the doctrine of the last clear chance. The instruction in this case fails to correctly state the rule. *Idem.*

Same: Evidence. Under the evidence in this action for injury at a railway crossing, it is held that the question of whether defendant might not have prevented the accident, was for the jury, although plaintiff's negligence in going upon the crossing continued up to the very time of the accident. *Idem.*

Crossings: Contributory negligence. If a traveler approaching a railway crossing sees a train at such distance that he believes he can safely cross in the exercise of ordinary care, he is not negligent in attempting to cross, although unable to pass over the track before he is struck by the train. *Idem.*

Crossing accident: Contributory negligence. A traveler about to cross a railroad track must use reasonable precaution for his own safety, he can not drive heedlessly upon the track without looking or listening for approaching trains and hold the railway company liable for his injuries; but he has the right to assume that trains will be run at a lawful rate of speed and that the railroad company will comply with its duty when they are approaching a crossing; and he is not, as a matter of law, required to stop his team before crossing, or to look and listen for an approaching train. But whether he was negligent in failing to do so in a given case is generally a question for the jury. *Case v. Chicago G. W. Ry. Co., 747.*

Same: Evidence. In this action for injury to plaintiff and his team while attempting to cross a railroad track the evidence relating to the speed of the train, the giving of signals and plaintiff's precaution for his own safety is reviewed, and is held to present a question of contributory negligence for determination by the jury. *Idem.*

RAILROADS Continued

Same: Contributory negligence: Instruction. Whether plaintiff might have seen the approaching train at the time and place he testified to having looked and listened therefor was, under the evidence, a question of fact, and the defendant was not entitled to an instruction that if he could have seen the train at that time and place he must be held to have seen it, or that he did not look and listen for it. *Idem.*

Same. An instruction that it was plaintiff's duty when he arrived at a point from which an approaching train could be seen to exercise precaution by looking for its approach, and if the train which injured him was in plain sight from the point where it was his duty to look, and the circumstances suggested a reasonable probability of danger, an attempt to cross was negligence, was not objectionable because of the use of the words "plain sight," as the same should be construed to mean within the range of plaintiff's vision. *Idem.*

Undertrack crossings: Contract: Evidence. In this action to enjoin the defendant railway company from closing an undertrack crossing on plaintiff's land, the evidence is reviewed and held sufficient to show that at the time of the conveyance of the right of way a written agreement was entered into between plaintiff and defendant's predecessor, by which plaintiff was to have the undertrack crossing in question as well as a surface crossing at another point, which were to be in part consideration for the right of way granted. *Longshore v. Chicago & G. W. Ry. Co.*, 463.

Same: Existing crossings: Notice to subsequent purchaser. The fact that right of way fences were built in and attached to a span of a railroad bridge forming a fenced passage under the track, was sufficient to put a purchaser of the road on inquiry as to whether there was an agreement between its predecessor and the landowner for an undertrack crossing at that place. *Idem.*

Injury to passenger: Contributory negligence. In this action for injury to plaintiff while riding in the baggage compartment of a combination car there was evidence that passengers were permitted to use the baggage compartment as a smoking room, and it is held that such permission amounted to an implied invitation to so use the room, and that plaintiff was not therefore guilty of contributory negligence as matter of law by being in the compartment for that purpose at the time of his injury. *Davis v. Iowa Cen. Ry. Co.*, 594.

Injury to servant: Incompetency of fellow servant: Instruction. In an action by a servant for personal injury on the ground of

RAILROADS Continued

TO

REAL PROPERTY

negligence of the master in employing and retaining an incompetent fellow servant, the plaintiff must show the employment and incompetency of the fellow servant at the time of the accident and that such incompetency caused the accident; he can not recover by showing negligence in the original employment without showing that the employment and incompetency continued up to the time of the injury. Under this rule an instruction that plaintiff must prove that his injury resulted from the negligence of the master in employing and retaining the fellow servant with knowledge of his incompetency was not erroneous because using the words employing and retaining conjunctively. This is especially true where the plaintiff by his pleading, in his proof and a requested instruction, treated the defendant's liability as growing out of the negligent employment and retention of the fellow servant. *Gregory v. Chicago, R. I. & P. R. Co.*, 715.

RAPE. See **CRIMINAL LAW.**

REAL PROPERTY. See **PUBLIC LANDS—VENDOR AND VENDEE.**

Adverse possession. A vendee of property in possession under a contract providing that he shall acquire title only upon performance of its conditions, can not, prior to performance or prior to a time when enforcement of the conditions of the contract is barred by limitation, assert a claim of adverse possession against his vendor. *Boynton v. Salinger*, 537.

Contracts for the sale of real estate: Offer to purchase: Terms of acceptance. Where the vendor of land attempts to convert an offer to purchase into a binding contract of sale, the acceptance of the offer must be of the very terms proposed; and if the seller undertakes to qualify his acceptance or to impose upon the buyer additional terms and conditions there is no contract which either party can enforce.

In this action the defendant submitted a written proposition of purchase together with a check for the amount of his first payment as provided in his proposition, but the plaintiff's acceptance contained terms and conditions not contemplated by the proposition, and the defendant is held to have been justified in refusing payment of the check and that plaintiff is not entitled to recover thereon. *Land & Securities Co. v. Hatch*, 18.

Same: Acceptance and approval of offer to purchase. A written proposition for the purchase of land, which contains an express declaration that the same is made subject to approval by the seller, is not binding until the same is accepted and approved as provided. *Idem.*

REAL PROPERTY Continued

Same: When a contract becomes binding. A written proposition to purchase land may of itself constitute a binding contract if such was the intention of the parties, even though a further and more formal writing was contemplated; yet this is only the case where the terms of the formal writing have been agreed upon. And where it was the understanding of the parties that a future writing should be executed by them detailing the terms and conditions of the transaction, it is a general rule that no contract is in fact effected until such writing is executed. *Idem.*

Same. Where the proposition to purchase is uncertain and indefinite as to some material terms there is a strong presumption that it was merely preliminary to a further contract, in which these matters should be agreed upon in detail. *Idem.*

Same: Acceptance by a third party. Where a proposition to purchase land is made to a certain person or corporation, contemplating acceptance by such person or corporation and a further written agreement detailing the terms and conditions of the purchase, the vendor can not insist that the purchaser enter into such future contract with a third person unless he chooses so to do; and where, as in this case, the subsequent contract was presented by the vendor in the name of another and was refused by the vendee that terminated the contract. *Idem.*

Contract of purchase: Fraud: Rescission: Waiver. A purchaser of real property seeking to rescind the contract on the ground of false representations must do so within a reasonable time; and, where as in this case, plaintiff made payments upon a contract some time after learning of the false representations, and continued to use the property without intimation of dissatisfaction and with full knowledge of the false statements for a period of several months, the right to rescind was waived. *Duetzman v. Kuntze, 158.*

Easements: Right of way: Forfeiture: Injunction. Where the purchaser of a tract of land also acquired from his grantor, as a part of the consideration, a road thereto over other land belonging to the grantor, for such time as he should keep the gates opening into the same closed, the easement thus acquired could not be forfeited at the pleasure of the grantor or his grantees, but only upon breach of the condition upon which the easement was granted. The evidence is held insufficient to show a breach of the condition and plaintiff is entitled to a protection of his rights in the easement by mandatory injunction, as against defendant's arbitrary closing of the way granted and tender of another way which plaintiff was under no obligation to accept. *Robbins v. Archer, 743.*

REAL PROPERTY Continued

Foreclosure of contract: Costs. Where a contract for the sale of real estate does not provide for the cost of an abstract of title in case of foreclosure of the contract, the expenses of the same will not be taxed as a part of the costs. *Boynton v. Salinger*, 537.

Grants: Reservation: Sufficiency of description. Although the description of land reserved from the grant in this case may not have been sufficiently definite to support a conveyance, still, as the reservation had reference to a certain area of coal to be left for a support to a building situated upon the reserved tract the description was sufficiently certain to require the grantees to leave the designated amount of coal unmined, and to authorize a recovery for the value of the coal taken therefrom. *Stewart v. Coal Co.*, 548.

Injury to growing crops: Measure of damages. The damage to growing crops where no injury to the land is claimed may be determined by estimating the damage to the crop directly, rather than indirectly by estimating the value of the land with the crops before and after the injury, by determining the value of the crop in the field, or on the market, with proper deductions for the cost of maturing and marketing of the same. *Tretter v. Chicago & G. W. Ry. Co.*, 375.

Same: Instruction: Assumption of fact. In this action the court instructed that recovery was sought for damage to growing crops and not to the land, and that in arriving at the amount of damage the jury should consider the cost of production up to the time of loss, the market value in the field or in the market place, and proximity to the market, and should consider all evidence of damage or loss and the opinion of witnesses as to the value of the crops and cost of production. *Held*, not objectionable as assuming a right of recovery, since there is no occasion for the jury to apply an instruction as to damages unless the other issues are found for the plaintiff, as to which the jury was elsewhere instructed; nor was it objectionable as proceeding on the theory that all the crops were destroyed; nor because unsupported by evidence of the cost of production. *Idem*.

Same: Measure of damages: Instruction. In an action to recover for injury to a growing crop the jury should be told whether plaintiff should be allowed the market value of the crop in the field or in the market place, and if in the market place whether deductions should be made for the cost of maturing and placing it upon the market, or whether such expense was to be eliminated. The instruction in this action is held to have been insufficient in these respects. *Idem*.

REPLEVIN

TO

SALES

REPLEVIN.

Venue: Execution of writ. The venue in a replevin action is properly laid in the county where the property is situated at the time of filing the petition and issuance of the writ, and where one of the defendants resides, although a codefendant may reside in another county; and the fact that subsequent to issuance of the writ the property or part thereof is removed to another county will not defeat the action, but the officer may follow the property and execute the writ in any county of the state where the property may be found. *Bummelhart v. Boone*, 390.

Petition: Sufficiency. A petition in replevin alleging that the property was obtained from plaintiff by conspiracy and fraud, that one of defendants first obtained possession and transferred the property to his codefendant in perpetration of the fraud, also alleging rescission of the oral arrangement under which possession was obtained and demanding return of the property, was in conformity with the statute defining the requisites of a petition in replevin. *Idem.*

Dismissal of action. Where the sheriff seized part of the property in the county in which the replevin action was properly brought, and the balance in another county to which it was removed after commencement of the action, the court erred in dismissing the action and quashing the writ, even though the seizure in the latter county might have been illegal. *Idem.*

RESCISSIION. See CONTRACTS—NEGOTIABLE INSTRUMENTS—SALES.

SALES.

Failure of consideration. Where, as in this case, stock food was sold for a particular purpose and upon representations that it was suitable for that purpose, upon which the purchaser relied, and which proved to be of no value for such use, there was a total failure of consideration. *Swift & Company v. Redhead*, 94.

Evidence. In this action for the price of stock food the evidence is held to sustain a finding that the same was not suitable for the purpose of fattening cattle as represented by the seller, but was in fact injurious and worthless for that purpose. *Idem.*

Warranty. No particular form of words is necessary to constitute a warranty; it only being necessary that the parties understood from their conversation that a warranty was intended. *Idem.*

Evidence. In this action the evidence is held sufficient to take the

VOL. 147 IA.—52.

SALES Continued

question of whether the seller warranted the stock food to be suitable for fattening cattle to the jury. *Idem.*

Breach of warranty: Damages. In an action for the price of stock food sold on a warranty that it was suitable for fattening cattle, the defendant is entitled to recover the damages naturally growing out of the breach of warranty; so that while he can not recover anticipated profits growing out of the use of the food, there being no representation as to the amount of such profits, he can recover damages caused by using the food, where the evidence shows that his cattle lost flesh when fed upon it and gained flesh when using other ordinary feed; such evidence showing damage with reasonable certainty. *Idem.*

Waiver of right to damages: Evidence. A purchaser of stock food can not recover damages caused by feeding the same after he fully learned of its injurious effects, even though advised by the agent of the seller to keep trying it and see if he could not determine the right amount to use; the agent not being authorized to give such advice and it being merely advice to experiment with the same. In this action the evidence is held to show that defendant learned of the injurious effects of the food shortly after using it and that he continued to feed the same with such knowledge. *Idem.*

Implied warranty. Where a dealer undertakes to furnish an article to fill an order from one who buys for resale, a warranty is implied that it is of merchantable quality; and this ordinarily means, in the case of a manufactured article, that it is of good material, well made and reasonably fitted for the use for which it is constructed and furnished. *Loxtercamp v. Implement Co.*, 29.

Express Warranty: Merger of implied warranty. The provision in a written order for a farm implement from a wholesale dealer, that the implement is subject to the warranties published in the catalogue of the manufacturer, if constituting an express warranty on the part of anyone it is the warranty of the wholesaler rather than that of the manufacturer, and is not necessarily inconsistent with an implied warranty, or to be taken as expressing the entire agreement. *Idem.*

Appeal: Change of theory. One who has induced a holding of the trial court that a contract of sale did not amount to an express warranty, can not, on appeal, escape liability for breach of implied warranty on the ground that the same was merged in the express warranty. *Idem.*

Sales Continued

Warranties: Express and implied. A written contract of sale and warranty will not of necessity deprive the buyer of the benefit of an implied warranty. *Idem.*

Breach of warranty: Inspection by purchaser: Waiver of defects.

One who purchases with an implied warranty an article of machinery, the real character and quality of which can only be determined by actual use, does not lose the benefit of his warranty by a failure to discover latent defects until the machine is put to the actual use for which intended. *Idem.*

Same. The duty of inspecting an article purchased only applies where the buyer undertakes to rescind the purchase; it can not be urged in an independent action to recover damages for breach of an alleged implied warranty. *Idem.*

Breach of warranty: Measure of damages. Although a purchaser of machinery for resale under an implied warranty pleads a loss of resale and consequent loss of profit because of a breach of the warranty; yet, if he also alleges that by reason of its defective condition the machine was wholly unsalable, useless and without value, he is not limited in his recovery to a loss of profits from the resale, but may recover the difference between the reasonable value of the machine had it been in merchantable condition as warranted, and its value in the actual condition in which it was delivered. *Idem.*

Place of payment. Where a promise is made to pay a stipulated price for goods on delivery of the same at a specified place the law will imply a promise to pay at that place. *Wayt & Son v. Meighen, 26.*

Rescission: Notice: Evidence. The statement by the purchaser of property, upon presentation for payment of the chattel mortgage note given for the purchase price, made to a collector having no authority to represent the payee in any other way, that the purchaser would return the property if the seller would cancel and deliver the note and mortgage and repay the amount paid on the purchase price, was not an objection by the purchaser to the condition of the property binding upon the seller. *Wurlitzer Co. v. Rhea, 382.*

Rescission: Pleadings. A pleading setting out a warranty in the sale of property and breach thereof, and offering to return the property to plaintiff in as good condition as when it was delivered to defendant, for the reason that it is unfit for the purpose for which it was sold, but failing to aver any prior offer to return or

SALES Continued	TO	SCHOOLS
to rescind the contract, is insufficient as a plea of rescission for a breach of warranty, although perhaps sufficient as a plea of failure of consideration. <i>Idem.</i>		
Failure of consideration: Evidence. Where the evidence conclusively shows that property purchased was not worthless but did have a substantial value, a plea of failure of consideration is not sustained. Such evidence is only available in support of a claim of rescission or for damages for breach of warranty or misrepresentation. <i>Idem.</i>		

Breach of warranty: Damages: Evidence. Where the purchaser of property warranted to be in first class repair keeps the same for some time after discovering that it is not in good condition, and with the seller's consent selects his own time for sending the same away for repair, and it does not appear that the time consumed in making the repairs is unreasonable, he can not recover for loss of business during the time reasonably consumed in making the repairs, because deprived of the use of the property. *Idem.*

SETTLEMENT AND RELEASE.

Personal injury: Fraud: Evidence. To set aside a settlement and release of a claim for personal injury on the ground of fraud, where the person executing the release was well advanced towards recovery, had consulted attorneys, was apparently capable of looking after his own interests and knew that the instrument he signed was a contract of settlement, the evidence of fraud in procuring the release must be clear and satisfactory. In this action the evidence is held insufficient to establish fraud as a matter of law. *Dickson v. Sioux City Term. Ry. Co.*, 601.

SCHOOLS.

Issuance of warrants: Injunction: Contempt. In this action the officers of a school district were enjoined from paying certain warrants, and upon holding the warrants invalid the court did not abuse its discretion in discharging the officials from an alleged contempt in proceeding to issue new warrants in place of the old ones, and in levying a special tax to meet the same, which act had been held lawful by the court and the new warrants had not been delivered or the old ones surrendered, and where the new warrants were to be paid out of the special tax levy which the officers had not been enjoined from making; especially as the information for contempt had not then been filed and the legislature subsequently to the decree in injunction had legalized the original warrants. *Carr v. District Court*, 663.

SPECIFIC PERFORMANCE

TO

TAXATION**SPECIFIC PERFORMANCE.** See **EQUITY.****STATUTES.** See **HUSBAND AND WIFE—INTOXICATING LIQUORS—PUBLIC LANDS.**

Although an unconstitutional statute is void and generally of no effect, still where it was enacted as a guide to public officials a very strong case must be made to justify their punishment for contempt in attempting to carry out the provisions of the statute. *Carr v. District Court*, 663.

Same. While the legislature can not change or modify a decree of court relating to private rights this rule does not apply in its full extent, if at all, to actions affecting municipal corporations which have been created as a part of the instrumentalities of government. *Idem.*

STATUTE OF FRAUDS.

The statute of frauds requiring contracts which are not to be performed within a year to be in writing does not apply, where the same contemplates performance by one of the parties within a year: As where one party contracts to sell his stock and not to re-engage in the business for a series of years, the other party agreeing to pay the consideration within a year. *Sausser v. Kearney*, 335.

TAXATION.

Assessment of omitted property: *Mandamus.* A proceeding before the county treasurer to have omitted property added to the assessment roll and listed for taxation, in which notice to property owners was given and to which they appeared and offered evidence is *quasi judicial*; and the act of the treasurer in determining that the property is not taxable is of a judicial character and is not void, although it may be erroneous; and *mandamus* will not lie to review his act and compel the treasurer to make an assessment of the property in behalf of the county. *Woodbury County v. Talley*, 498

Sale of property: Redemption: Notice. To cut off an owner's title by a sale of land for taxes and issuance of a tax deed, statutory notice of the expiration of the time of redemption must be given; and where such notice is not given the defendant in a suit to quiet title by the holder of the tax deed need not allege payment of the taxes on which the sale and deed are based, but

TAXATION Continued

to

TELEGRAPHS AND TELEPHONES

an offer to pay the same as found due, or which he is required in equity to pay, is sufficient. *Neilan v. Unity Investment Co.*, 677.

Same: Redemption: Limitation. Notice of expiration of the time of redemption from a tax sale must be personally served upon a resident owner; the service can not be made by publication. And when attempted to be made by publication it is in effect no notice and the property remains subject to redemption by the owner notwithstanding the five-year bar in certain cases provided by the statute. And this rule obtains where an invalid sale had been made because of unpaid grading taxes. *Idem.*

TELEGRAPHS AND TELEPHONES.

Telegraphs: Negligence: Damages: Evidence. In this action for negligent delay in the transmission and delivery of a telegram plaintiff's direct examination touching his damages only purported to state approximately his expense items, one of which was a claim for railroad fare. *Held*, that on cross-examination he should have been permitted to state whether he actually paid out any money for transportation or whether he rode on free transportation, and whether the amount stated was what he supposed the actual fare was, or was the expense actually incurred, as tending to test his knowledge of and opportunity to know what the fare actually was. *Salinger v. Telegraph Co.*, 484.

Same. In an action for damages for unreasonable delay in the transmission and delivery of a telegram, the plaintiff not only has the burden of showing delay but of proving his damages also. And even though the evidence is sufficient to warrant a verdict, still, the amount of recovery is a question for the jury; especially where, as in this case, the damage claimed included an item for the value of plaintiff's time in a stated employment and it was not clear that he was thus employed; and especially where the item of damage was the subject of expert evidence which is not conclusive although uncontradicted.

The evidence in this action is held insufficient to warrant the court in directing a finding for plaintiff as to the amount of his damage. *Idem.*

Same: Negligence: Damages recoverable. Where a cause of action against a telegraph company has fully accrued, expenses reasonably necessary and constituting part of plaintiff's damages may be recovered, although incurred after his claim was served on the telegraph company as required by the statute. *Idem.*

TRESPASS. See MINES AND MINING.

TRUSTS

TRUSTS. See **EQUITY.**

Evidence: Sufficiency. Where one holds the legal title to property it requires a clear and satisfactory showing to justify the court in decreeing that the property is held in trust. In this action to partition real estate in which plaintiff claimed to own one-half absolutely and to hold the other one-half in trust, the evidence is held insufficient to sustain defendant's claim that the entire property was held by plaintiff as trustee in a resulting trust. *Lillie v. Owen*, 290.

Limitation of actions. Ordinarily the denial by a trustee of the rights of the *cestui que* trust so that his possession becomes adverse, will set the statute of limitations in operation; and a transferee of the trust property becomes a trustee by construction of law, so that the statute of limitations begins to run from the time of transfer, or as soon as the *cestui que* trust has knowledge thereof. *Blackett v. Ziegler*, 167.

Same: Remainders. Where property is left to one in trust for life, upon his death to become the property of his heirs, and during the life estate the trustee transfers the property, the remainderman, in the absence of other circumstances, may assume that it is held by the transferee subject to his claim, and the statute of limitations will not commence to run against an action by him to preserve the trust until the life estate is terminated. *Idem.*

Same: Former adjudication: Pleadings. In this action to preserve and enforce a trust alleged to have been created by the testator in favor of one of his children, the remainder to plaintiffs, his heirs, the petition alleged that the executor conveyed certain real estate at a sum less than its value to his wife, one of the testator's heirs, with knowledge of the wife as to its actual value and of the trust impressed upon the property; that subsequently the executor turned over to his wife a portion of the trust fund; that the executor died and upon administration of his estate the remaining trust funds were turned over to his wife, but this was not alleged to have been done in settlement of the trust fund, nor was the discharge of the executor as trustee alleged, nor that the distribution was ordered or approved, although it was alleged that the plaintiffs were represented in the probate proceedings in a perfunctory way by a guardian *ad litem*. Plaintiffs ask that the trust fund be turned over to a trustee. *Held*, that the petition was not demurrable on the ground that the matters alleged had been adjudicated in the probate proceedings. *Idem.*

TRUSTS Continued

TO

VENDOR AND VENDEE

Same. In the absence of allegations to that effect it will not be presumed that the wife intended to hold the property in opposition to the terms of the trust and adversely to the plaintiff and her holding with knowledge, as alleged, was not such a repudiation of the trust as would start the running of the statute of limitations against the plaintiff, so that the petition did not show on its face that the action was barred, thus rendering it subject to demurrer. *Idem.*

VENDOR AND VENDEE.

Foreclosure of contract: Pleadings: Misjoinder of causes. A vendor of property upon a contract for payment of the purchase price in installments, may, upon default of payment, bring his action to foreclose the contract and ask that the purchaser be required to perform, or that his interest in the property be foreclosed and sold, and the pleading will not be subject to the objection that there was a misjoinder of causes of action. *Boynton v. Salinger, 537.*

Same: Pleadings: Tender of deed. A vendor of property in seeking to enforce payment by foreclosure of the contract need not allege tender of a deed conveying the property, nor need he tender the deed, although a different rule would prevail in a law action. *Idem.*

Same: Pleadings: Former ownership: Proof of same. Although the vendor of property in seeking to enforce the contract by foreclosure may have alleged that prior to execution of the contract he was the owner of the property, yet where defendant admitted the contract, alleged possession thereunder, and the only further obligation of the vendor was the execution of a deed to the property, proof of former ownership was not essential to a *prima facie* case for plaintiff. *Idem.*

Same: Payment in installments: Limitation of action. Under a contract for the sale of property providing that the purchase price shall be paid in installments on or before a specified date, a right of action accrues upon each installment as the same falls due, and the statute of limitation commences to run against an action thereon from that date; and unless action is instituted within ten years from that date the bar of the statute becomes effectual even though subsequent installments are not then barred. *Idem.*

Same: Payment: Application. Under a contract for the purchase of property and payment in installments, payments made without

VENDOR AND VENDEE Continued

TO

WATERS

application by either party prior to the time when part of the installments are barred, can not be so applied by the parties after suit is commenced to foreclose the contract; but equity will make the application on the installments first maturing although barred. *Idem.*

Same: Foreclosure of contract: Proof of title. Where an action to foreclose a non-negotiable contract for the sale of real property is brought in the name of one of several vendors named therein, the presumption is that all of the vendors continue to be the owners of the contract; and although plaintiff alleges his ownership, still, where defendant demands strict proof of the allegation he is required to prove his interest. *Idem.*

VENUE. See REPLEVIN.**WATERS.** See DRAINAGE.

Flood waters: Injury to growing crops: Measure of damages. The measure of damages for injury to growing crops by reason of flooding of the same, in an action by the owner of the land, is the difference between the value of the land with the crops growing thereon prior to the flood, and its value after the flood; but the measure of damages for such injury to crops grown on the land of another is the difference in the reasonable market value of the standing and growing crops, immediately before and immediately after the injury, taking into account the right to mature and harvest the same. *Jefferis v. Chicago & N. W. Ry. Co., 124.*

Same: Evidence. In this action the plaintiff is suing for damage to crops grown on his own land and those grown by him on adjoining land. He made no claim of damage to his own land other than to the growing crops thereon, and there was no evidence of any formal lease of the land of the other or of any rental which plaintiff agreed to pay therefor. *Held,* that plaintiff was properly permitted to testify as to the difference in value of the crop raised on such land as it stood before the flood and its value afterward, taking into account the right to mature and harvest the same so far as not destroyed by the flood, as the measure of his damage. *Idem.*

Same. Where plaintiff is entitled to some damages to growing crops because of flooding the land, it is proper in estimating such damages to determine what the value of the crops would have been in the course of ordinary events if matured; and where the evidence tended to show that the season was favorable to such

WATERS Continued

crops, it was permissible to prove the usual yield and the usual market value in that locality, even though other contingencies might have affected the value of the crops. *Idem.*

Same: Flood waters: Negligence: Evidence. Where the evidence, as in this case, was sufficient to show that a dam composed of driftwood was formed, and that the damage to plaintiff's crops resulted from the negligent breaking up of the dam by the defendant and a deposit of the flood wood farther down the stream, causing the water to break over the embankment of the stream and flood plaintiff's land, there was sufficient evidence to entitle plaintiff to recover for injury to his crops; and a refusal of evidence relating to previous and subsequent breaks in the embankment of the stream was not erroneous. *Idem.*

Same. The evidence in this action on the question of whether defendant negligently strung wires across a bridge, at which place flood wood formed a dam, and permitted the same to remain longer than was proper, thus contributing to the formation of the dam, was sufficient to take that question to the jury. *Idem.*

Same. The evidence in this action is also held sufficient to warrant a submission to the jury of the question whether defendant's employees were negligent in breaking up the original dam, causing the flood wood to pass farther down the stream, there forming a dam and flooding plaintiff's crops. *Idem.*

Same: Instruction. The evidence in this case tending to show that the original dam in question was caused or contributed to by wires strung on defendant's fence, that the dam was in part on defendant's land and that it caused the water to flow along its right of way and imperil its track, was sufficient to authorize a submission of the question of defendant's duty to remove the wires. *Idem.*

Same: Negligent acts of agent: Liability of principal. Where, as in this case, the evidence is sufficient to warrant the conclusion that defendant's employees were acting in its interest in removing the dam or obstruction to the waterway in question, their acts in so doing, if performed in good faith, are binding upon the defendant. *Idem.*

Same: Negligence: Proximate cause: Evidence. The evidence in this action is held sufficient to show that there was reason to believe, on the part of defendant's employees, that the flood wood flowing down the stream after the dam in question was broken up would lodge further down the stream and obstruct the flow

WATERS Continued

TO

WILLS

of water, and cause the bank of the stream to break with resulting injury to plaintiff's crops; and that on the whole case there is sufficient evidence of negligence and that the breaking of the embankment was the proximate result thereof to take the case to the jury. *Idem.*

WARRANTY. See SALES.

WILLS. See ESTATES OF DECEDENTS.

Contest: **Review on appeal.** Where it is contended on appeal by the proponents of a will that a verdict should have been directed in their favor, as against a contention of incapacity on the part of the grantor, the court will assume the truth of contestant's evidence. *In re Will of Van Houten, 725.*

Same. Where both the questions of mental competency and undue influence in the execution of a will are submitted to the jury and both are determined affirmatively, the fact that the finding upon one of the issues was without support in the evidence will not entitle the proponent to a reversal, if there was evidence on which the other finding can be upheld. *Idem.*

Evidence: **Transactions with a decedent.** The contestant of a will and heir of the testator is incompetent to testify to a transaction between the testator and a third party and the conversation relating thereto, where it appeared that the witness was present at the suggestion of the third party to attend to and look after the interests of the testator, and he in fact transacted the business in question for him. *Idem.*

Same: **Sufficiency of offer: Review of ruling.** Where it appeared in the abstract that the proponents of a will identified and offered separately the notice, petition and answer in a proceeding by one of contestants for the appointment of a guardian of testator's estate on the ground of his mental incapacity, and it also appeared that the record of the proceedings, among which was a judgment dismissing the petition on the merits, was offered, there was a sufficient showing of an offer of the judgment to authorize a review of the ruling excluding it. *Idem.*

Contest: **Mental capacity: Evidence.** A judgment dismissing proceedings for the appointment of a guardian of the estate of a testator, instituted on the ground of mental incompetency, is admissible as bearing upon his mental condition at the time of his subsequent execution of a will. *Idem.*

Contest: **Mental incapacity: Instruction.** Where the contestant

WILLS Continued

of a will relied to a large extent upon evidence of the alleged paralysis of the testator as tending to render him incapable of making a will, and there was also other evidence of mental weakness upon which the contestants relied, it was error for the court to instruct that unless the jury found the contestant to have been affected by the stroke of paralysis the will must be sustained. *Munier v. Michel*, 312.

Construction: Death of legatee: Disposition of devise. The heirs of a devisee dying before the testator, will, under the statute, inherit the property so devised, unless a contrary intent is manifest from the terms of the will; but where by the terms of the entire will, as in this case, the manifest intent of the testator is to dispose of his estate without the aid of the statute and contrary thereto, the heirs of a legatee dying before the testator can not invoke this statute in their behalf. *In re Estate of Phelps*, 323.

Joint or mutual instruments: Validity: Probate. The joint or mutual character of a will does not in itself affect its validity, and if otherwise valid it may be probated and enforced as the will of the testator dying first, or as the separate will of each, or as the joint and mutual will of both, according to its nature and terms; and where such a will is reciprocal merely its probate as the will of the first deceased is usually all that is necessary to accomplish the intended purpose. *Baker v. Syfritt*, 49.

Same: Probate of joint wills. Where the makers of a joint will own and hold the property devised in severalty only, the instrument may well be treated as the individual devise of each and successively probated as such; but where the property is owned jointly it has been held that while the instrument may be probated as the separate will of each, it is proper to await the death of the survivor and then probate it as the joint will of both. *Idem*.

Same: Agreement to make will: Joint ownership. A will is not a contract, yet the terms and benefits thereof may be the subject of contract so that where a husband and wife dispose of property held by them in severalty by a joint will, and in so doing declare in express terms that they are in fact joint owners thereof, the court will treat the property, on the assumption that it represents the fruit of their joint labors, as being a common estate at the date of the will. *Idem*.

Joint or mutual wills: Revocation. Where two persons competent to make a testamentary disposition of their property enter

WILLS Continued

into a contract by which they unite in devising their joint or several estates to a designated third person, subject to a life estate in the surviving testator, and upon the death of one the survivor avails himself of the benefits of the will in his favor, he can not thereafter revoke the will but will be treated as holding the property in trust for the purpose indicated in the compact. *Idem.*

AUTHORITIES CITED

IN THE OPINIONS REPORTED IN THIS VOLUME.

A

11 Am. & Eng. Ency. of Law (2d Ed.)	434	452
17 Am. & Eng. Ency. of Law, (2d Ed.)	606	733
22 Am. & Eng. Ency. of Law, 441, 442		183
27 Am. & Eng. Ency. of Law, 682		573
30 Am. & Eng. Ency. of Law (2d Ed.)	621	57
30 Am. & Eng. Ency. of Law, 144		101
Am. & Eng. Ency. of Law, Article, Wills		56

B

1 Bishop on Criminal Proceedings, Sec. 1119		655
1 Bishop, New Criminal Law, Sec. 35		519
1 Bishop, New Criminal Law, Secs. 205, 285, 291b		522
1 Bishop, New Criminal Law, Secs. 292, 312		522
4 Blackstone's Commentaries, 27		522
Blackstone, Laws of England, Vol. 1, p. 46		531
2 Bouvier's Law Dict., 320		574
Buswell on Insanity, Sec. 194		733

C

Clark & Marshall, Law of Crimes, 355		569
Coke, Littleton, 292b		542
Cooley on Constitutional Limitations (3d Ed.) 188		530
1 Cyc., 249		117
7 Cyc., 551		633
13 Cyc., 114		147
13 Cyc., 116		148
13 Cyc., 411		542
16 Cyc., (c) and (d), 918		146
18 Cyc., 1192, 1196		302
30 Cyc., 1416		574

E

7 Ency. of Evidence, 477		733
11 Ency. of Evidence, 337		320
8 Ency. of Pleading & Practice, 751		196
Endlich on Interpretation of Statutes, Sec. 363		526

G

- 1** Greenleaf on Evidence, Sec. 556 733

J

- | | |
|---|--------|
| 1 Jarman on Wills, 18 | 57 |
| 1 Jarman on Wills, 27 | 54, 58 |
| Jones on Mortgages, (5th Ed.) Sec. 565 | 633 |
| 2 Jones on Mortgages, Sec. 1459 | 544 |
| 2 Jones on Mortgages, Secs. 1577, 1700 | 544 |

L

- | | |
|--|-----|
| 1 Labatt on Master & Servant, Sec. 29 | 691 |
| Lieber's Hermeneutics, 283 | 518 |

M

- | | |
|--|-----|
| May on Insurance, Sec. 507 | 286 |
| 1 McClain's Criminal Law, 367 | 219 |

P

- | | |
|--|-----|
| Page on Contracts, Secs. 571, 572 | 402 |
| Perry on Trusts, Sec. 860 | 173 |
| Pomeroy's Equity Jurisprudence, Sec. 1342 | 746 |
| 3 Pomeroy's Equity, 1048 | 172 |

R

- 1** Redfield on Wills, 183 57

S

- | | |
|---|-----|
| Schouler on Wills, Sec. 454 | 58 |
| Schouler on Wills, (2d Ed.), Sec. 457 | 54 |
| 2 Story's Equity Jurisprudence, Sec. 785 | 58 |
| Sutherland on Statutory Construction, Sec. 319 | 525 |

T

- Thompson on Negligence, Secs. 532, 665 243

W

- | | |
|---|-----|
| 3 Wigmore on Evidence, Sec. 1671 | 733 |
| Wood on Limitations, Sec. 126 | 541 |
| Wood on Limitations, Sec. 208 | 173 |
| Wood on Limitations, Sec. 224 | 544 |
| Wood on Limitations, Sec. 259 | 545 |

CASES CITED IN THE OPINIONS REPORTED IN THIS VOLUME.

A

Adams v. Adams	70	Iowa, 253	619
Adams v. R. R. Co.	138	Iowa, 487	206
Adams v. Snow	65	Iowa, 435	680
Ackerman v. Hilpert	108	Iowa, 247	301
Aetna Bank v. Fourth Nat. Bank	46	N. Y., 82	644
Aetna Life Ins. Co. v. Fitz- gerald	165	Ind., 317	118
Ahrens v. Jones	169	N. Y., 555	61
Alexander v. Bryan	110	U. S., 414	307
Allen v. Church	101	Iowa, 116	270
Allen v. Pierpont	22	Fed., 582	276
Allen v. Ry. Co.	57	Iowa, 623	196
Allison v. Parkinson	108	Iowa, 154	314
Atwood v. Arnold	23	R. I., 609	175
Am. Accident Co. v. Reigart.	94	Ky., 547	116
Am. Waterworks Co. v. State	46	Neb., 194	628
Anderson v. Fleming	66	L. R. A., 153	244
Anderson v. Pittsburgh Co... Co.	108	Minn., 455	693
Apple v. Apple	38	Tenn., 348	62
Arnold v. City of Ft. Dodge.	111	Iowa, 152	261
Arnold v. Spates	65	Iowa, 571	305
Artz v. R. R. Co.	44	Iowa, 288	201, 203
Asborne v. Metcalf	112	Iowa, 540	582
Atlantic Co. v. Carbondale Co.	99	Iowa, 234	635
Attorney General v. Algon- quin	153	Mass., 447	746
Austin v. State	22	Ind. App., 221	534
Austin v. Wilson	46	Iowa, 363	541, 546
Avent v. Arrington	105	N. C., 337	546

B

Baggott v. Boulger	2	Duer (N. Y.) 160	308
Bagley v. Scudder	66	Mich., 97	674

Baily v. Berkhofer	123	Iowa, 59	27
Bailey v. Mayor	3	Hill (N. Y.) 531	242
Baker v. Johnson County ..	37	Iowa, 186	23
Baker v. Sherman	71	Vt., 439	653
Baldwin v. Hill	97	Iowa, 586	711
Baldwin v. R. R. Co.....	63	Iowa, 210	203
Bank v. Anderson	14	Iowa, 544	577, 579
Bank v. Bangs	84	Ky., 135	635
Bank v. Carroll	128	Iowa, 230	506
Bank v. Dutcher	128	Iowa, 413	33, 270
Bank v. Macalester	9	Pa., 475	645
Barchard v. Kohn	157	Ill., 579	632, 633
Barmore v. Vicksburg S. & P. R. Co.	85	Miss., 426	134
Bartel v. Hobson	107	Iowa, 647	672
Bartel v. Mathias	19	Ar., 482	542
Bartholomew v. Adams	143	Iowa, 354	166
Barry v. R. R. Co.....	119	Iowa, 62	205, 212
Bass v. Shakopee	27	Minn., 250	672
Batie v. Allison	77	Iowa, 313	23
Baxter v. Chicago, R. I. & P. R. Co.	87	Iowa, 488	134
Baxter v. Hecht	98	Iowa, 534	60
Beason v. Jonason	14	Iowa, 399	269
Beck v. Minn. & W. Grain Co.	131	Iowa, 62	17
Beckwith v. Nott Co.		Cro. Jac., 504	543
Bellingham Bay Land Co. v. Dibble	4	Wash., 764	545
Benbow v. Kellom	52	Minn., 433	674
Bennett v. Emmetsburg	138	Iowa, 67	237
Bennett v. Richards	83	S. W. (Ky.) 154	88
Bennett v. State	86	Ga., 401	655
Beresford v. Coal Co.	124	Iowa, 39	228, 690, 692
Berry v. Berry	115	Iowa, 543	289
Betts' Estate	113	Iowa, 115	729
Betts v. Harper	39	Ohio St., 639	54
Betts v. Railroad Co.	92	Iowa, 343	434
Bever v. Spangler	93	Iowa, 576	314
Bird v. Jacobs	113	Iowa, 194	55
Bissell v. Forbes	1	Cal. App., 606	544
Bixby v. R. R. Co.	105	Iowa, 293	197
Black v. Richard	95	Ind., 184	54
Blackmore v. Fairbanks	79	Iowa, 282	33
Blake v. Counselman	95	Iowa, 219	17
Blake v. Railway Co.	89	Iowa, 8	595
Blotcky v. O'Neill	83	Iowa, 574	635

Blunck v. Chicago & N. W.

R. Co.	142	Iowa, 146	127, 129, 130,	377
Blydenburgh v. Miles	39	Conn., 484		536
Bonnell v. Jacobs	36	Wis., 59		35
Boone Co. v. Jones	54	Iowa, 709		307
Boswell v. Laird	8	Cal., 469		242
Bower v. Daniel	198	Mo., 289		57
Bowers v. Hallock	71	Iowa, 218		681
Bowes v. Shand, L. R.	2	App. Cas., —		562
Bowling v. Cook	39	Iowa, 200		577
Bowman v. Humphrey	132	Iowa, 234		461
Bourne v. Shapleigh	9	Mo. App., 64		25
Bourrett v. R. R. Co.	121	N. W. (Iowa) 380....208, 210,	213	
Bradley v. Palen	78	Iowa, 126		29
Bradshaw v. State	76	Ark., 562		457
Brainard v. Simmons	58	Iowa, 464		472
Brandes v. Brandes	129	Iowa, 351		55
Brann v. Railroad	53	Iowa, 595		691
Brannum v. O'Connor	77	Iowa, 632		619
Breathitt v. Whittaker	47	Ky., 530		56
Breathitt v. Whittaker	8	B. Mon. (Ky.) 530		54
Brehm v. Railroad	34	Barb., 256		243
Brennan v. Roberts	125	Iowa, 615		623
Brewster v. Davenport	51	Iowa, 427		235
Brigg v. Helton	99	N. Y., 517		35
Brown v. Brown	124	N. C., 19		323
Brown v. Holden	120	Iowa, 191		635
Brown v. Honeyfield	139	Iowa, 414		746
Brown Land Co. v. Lehman.	134	Iowa, 712		652
Brown v. Railroad Co.	54	Wis., 342		644
Bruce v. Moon	57	S. C., 60		58
Bryant v. Ondrak	87	Hun, 477		25
Bryson v. Railway	89	Iowa, 677		653
Buce v. Eldon	122	Iowa, 92		582
Bucy v. Pitts	89	Iowa, 464	33, 34	
Bull v. Keenan	100	Iowa, 144		635
Burdick v. Wentworth	42	Iowa, 440		541
Burlington v. Keelar	18	Iowa, 59		345
Burnham v. Brown	23	Me., 400		521
Burroughs v. Cherokee	134	Iowa, 429	163, 349	
Bush v. Stowell	71	Pa., 208	541, 542	
Bushman v. Taylor	2	Ind. App., 12		35
Butler v. Townsend	126	N. Y., 105		246
Buzick v. Buzick	44	Iowa, 259		175
Byram v. Stout	127	Ind., 195	632, 633	

C

Cain v. Story	15	Iowa, 378	269
Cameron v. Railroad Co.	8	N. D., 134	398
Camp v. R. R. Co.	124	Iowa, 238	202, 215
Campbell v. Collins	133	Iowa, 152	157
Carl v. Knott	16	Iowa, 379	92
Carmichael v. Carmichael ...	72	Mich., 76	58, 61
Carnes v. Assn.	106	Iowa, 281	117
Carroll County Supervisors v. United States	18	Wall., 71	526
Carter v. Cemansky	126	Iowa, 506	681
Carter v. Griffin	54	Iowa, 62	269
Cary v. Ins. Co.	127	Wis., 67	118
Casgrain v. Milwaukee	81	Wis., 113	264
Casoni v. Jerome	58	N. Y., 315	308
Caulkins v. Hellman	47	N. Y., 449	563
Cedar Rapids Gaslight Co. v. City of Cedar Rapids	144	Iowa, 642	628, 629
Central Accident Ins. Co. v. Rembe	220	Ill., 151	118
Central Land Co. v. West Virginia	159	U. S., 103	516
Center School Township v. State	150	Ind., 168	517, 525, 527
Central Trust Co. v. Stepanek	138	Iowa, 131	577
Chamberlain v. Brown	144	Iowa, 601	270
Chantland v. Sherman	125	N. W. (Iowa) 871	175
Chase v. Wright	116	Iowa, 555	300
Cheadle & Zangs v. Gittar..	68	Iowa, 680	147
Checkrower Co. v. Bradley ..	105	Iowa, 537	33, 34
Chicago, A. & N. Ry. Co. v. Whitney	143	Iowa, 506	491
Chicago, B. & Q. R. R. v. Kelley	105	Iowa, 106	681
Childs v. McChesney	20	Iowa, 431	624
Chismore v. Anchor Ins. Co.	131	Iowa, 180	510, 511
Christ v. Webster City	105	Iowa, 119	653
Christiansen v. R. R. Co....	140	Iowa, 345	203
Church of Bloomington v. Muscatine	2	Iowa, 60	674
Citizens Bank v. Dows.....	68	Iowa, 460	634
City of Austin v. Austin City, etc.	87	Tex., 330	351
City of Burlington v. Bum- gardner	42	Iowa, 672	345, 349
City of Chariton v. Barber...	54	Iowa, 360	345

City v. Dudley	129	Ind., 112	351
City of Mt. Pleasant v. Breeze	11	Iowa, 399	345
Clark v. Shelton	16	Ark., 474	305
Clark v. Telephone Co.	146	Iowa, 428	690, 692
Clark v. Ward	12	Grat. (Va.) 440	634
Clifford v. Kampfe	147	N. Y., 385	175
Clifton Land Co. v. Des Moines	144	Iowa, 625	238
Clinton Novelty Iron Works v. Neiting	134	Iowa, 311	121
Cochrane v. Rich	142	Mass., 15	634
Cocke v. Stewart	2	Tenn., 232	542
Coffey v. Gamble	117	Iowa, 550	672
Coldren v. LeGore	118	Iowa, 212	198
Collar v. Ford	45	Iowa, 331	411
College v. Rich	151	N. Y., 282	61
Commonwealth v. Allen	135	Pa., 483	650
Commonwealth v. Hitchins..	71	Mass., 482	536
Commonwealth v. Kimball..	24	Pick. (Mass.) 366	534
Commonwealth v. Mudgett..	174	Pa., 211	568
Commonwealth v. Murphy...	165	Mass., 66	536
Commonwealth v. Stebbins..	8	Gray (Mass.) 592	522
Conklin v. Standard Oil Co.	138	Iowa, 596	100
Conroy v. Wetmore	92	Iowa, 100	681
Connell v. Iowa St. Travel- ing Men's Assn.	139	Iowa, 444	119
Conway v. Wilson	44	N. J. Eq., 457	633
Coolidge v. Brookline	114	Mass., 592	484
Cooks v. Whorwood	2	Sound, 337	542, 543
Cooper v. City of Oelwein..	145	Iowa, 181	170
Correll v. R. R.	38	Iowa, 120	751
Corriell v. Bronson	6	Iowa, 471	12
Corey v. Ft. Dodge	133	Iowa, 666	236, 265
County Commissioner v. King	13	Fla., 463	526
Cousins v. Paxton & G. Co...	122	Iowa, 465	147, 149
Cowan v. Telegraph Co.	122	Iowa, 379	643
Cowins v. Tool	36	Iowa, 82	302
Cowles v. Railway	32	Iowa, 515	653
Cox v. Cline	356	Iowa, 139	128
Cox v. Harris	64	Ark., 213	632
Crawford v. Nolan	70	Iowa, 97	634
Creveling v. Banta	138	Iowa, 47	48
Crockett v. Crockett	132	Iowa, 388	706
Creamery Pkg. Mfg. Co. v. Benton Co. Cry.	120	Iowa, 584	102
Cunningham v. Cunningham.	125	Iowa, 681	293

Cunningham v. People	210	Ill., 410	650
Cummings v. R. R. Co.	114	Iowa, 85	207, 751

D

Dalby v. Campbell	26	Ill. App., 502	148
Danner v. Hotz	74	Iowa, 391	157
Davenport v. Cummings	15	Iowa, 219	653
Davie v. Briggs	97	U. S., 628	284
Davis v. Close	104	Iowa, 261	6
Davis v. Herrington	53	Ark., 5	541
Davis v. Sweeney	75	Iowa, 45	33
Day v. Baldwin	34	Iowa, 380	541
Delamater v. South Dakota..	205	U. S., 93	514
Des Moines v. Gilchrist	67	Iowa, 212	345
Des Moines Gas Co. v. Des Moines	44	Iowa, 505	235
Den v. Clark	10	N. J. Law, 217	734
Deobold v. Opperman	111	N. Y., 531	307, 308
DeUprey v. DeUprey	23	Casl., 352	542
Devinne v. Railroad Co.	100	Iowa, 692	435
Devlin v. Smith	89	N. Y., 270	244, 245, 246
Dewey v. Des Moines	101	Iowa, 416	235
Dewey v. Railroad Co.	31	Iowa, 373	278
Dist. Twp. v. Independent Dist.	72	Iowa, 687	480
Dix v. Smith	9	Okl., 124	632, 634
Doherty v. R. R. Co.	137	Iowa, 358	205, 211
Dolan v. Hubinger	109	Iowa, 408	134
Donley v. Porter	119	Iowa, 545	360
Donnelly v. Smith	128	Iowa, 257	157, 459, 624
Dorr v. United States	195	U. S., 138	285
Dorris v. Miller	105	Iowa, 564	635
Douglass v. Agne	125	Iowa, 67	653
Douglass v. Pike County	101	U. S., 677	517, 525, 528, 529
Downes v. Bidwell	182	U. S., 244	285
Drake v. Chicago, R. I. & P. R. Co.	63	Iowa, 302	127, 128, 377
Drummond v. Drug Co.	133	Iowa, 266	157, 459
Duckett v. National Mechan- ics Bank	86	Md., 400	173
Dufour v. Periera	1	Dick., 421	54, 56
Dunham v. Osborn	1	Paige (N. Y.) 634	62
Dunlap v. Thomas	69	Iowa, 358	711
Dunn v. Railway	58	Me., 187	595
Dwyer v. Goran	29	Iowa, 126	183

Dyckman v. Sevatson	39	Minn., 132	632
Dyer v. Cady	20	Conn., 563	633

E

Eason v. Gester	31	Iowa, 475	269
Edinger v. Bain	125	Iowa, 391	8
Edson v. Parsons	155	N. Y., 555	58
Edwards v. Bibb	54	Ala., 475	62
Edwards v. Darby	12	Wheat., 206	526
Ellinwood v. Holt	60	N. H., 57	633
England v. England	94	Iowa, 716	611
Etzkorn v. Oelwein	142	Iowa, 107	197
Evans v. Collins	94	Iowa, 432	17
Evans v. Warren	122	Mass., 303	632, 633
Ex parte Day	1	Bradf. Sur. (N. Y.) 476....	54
Ex parte Keeler	45	S. C., 537	536
Ex parte Selma R. R.....	45	Ala., 730	526
Ex parte Swann	96	Mo., 44	536
Express Co. v. Des Moines Nat. Bank	146	Iowa, 448	171
Ex rel. Kopel v. Bingham... Ewing v. Webster City	211 103	U. S., 468	285
		Iowa, 226	351

F

Fairfield v. Gallatin County..	100	U. S., 52	526
Falconer v. Simmons	51	W. Va., 172	527
Farmer v. Bank	130	Iowa, 469	577
Farrior v. New England Co..	92	Ala., 176	527
Fenner v. Crips	109	Iowa, 455	357
Fenton Case	97	Iowa, 195	732
Ferguson v. Ferguson	111	Iowa, 158	706
Ferris v. Comstock	33	Conn., 513	103
Fink v. Mohn	85	Iowa, 739	269
First Bank v. Johnson.....	68	Neb., 641	632
First Congregational Church v. Muscatine	2	Iowa, 69	623
First, etc., v. Smith	163	Pa., 561	242
Fisher v. Cass County	75	Iowa, 232	623
Fisher v. McDaniel	9	Wyo., 457	536
Fisher v. Minot	10	Gray (Mass.) 260	563
Fitch v. Traction Co.....	124	Iowa, 665	595
Fitchner v. Fidelity Mut. Assn.	103	Iowa, 276	510
Fletcher v. State	49	Ind., 124	655
Foley v. Packing Co.,.....	119	Iowa, 225	690

Ft. Dodge Coal Co. v. Willis.	71	Iowa,	152	.....	28
Foster v. Brown	55	Iowa,	686	.....	345
Fowler v. Chadima	134	Iowa,	210	.....	711
Fox v. Wunderlich	64	Iowa,	187	.....	653
Foxell v. Fletcher	87	N. Y.,	480	.....	542
French v. French	84	Iowa,	659	.....	619
Froman v. Froman	53	Mich.,	581	.....	674
Frorer v. Hammer	99	Iowa,	48	.....	17
Fuller v. Cushman	170	Mass.,	286	.....	304

G

Gallaher v. Garland	126	Iowa,	206	.....	681
Galloway v. Railroad Co.	87	Iowa,	45	.....	435
Garretty v. Brazell	34	Iowa,	100	.....	653
Gelpcke v. City of Dubuque.	1	Wall.,	175	.....	517
Gelpcke v. Dubuque	68	U. S. (1 Wall.)	206	.....	526
George v. Butler	26	Wash.,	456	.....	544
Gibson v. Cooley	129	Iowa,	529	.....	506
Giddings v. Blacker	93	Mich.,	1	.....	88
Gilcrist v. Gottschalk	39	Iowa,	311	.....	635
Gjerstadengen v. Van Duzen.	7	N. D.,	612	.....	452
Glass Works v. Barnes	86	Hun.,	374	.....	24
Glover v. Board of Education	14	S. D.,	139	.....	674
Golden v. Newbrand	52	Iowa,	59	.....	134
Gorham v. Gross	125	Mass.,	240	.....	242
Gower v. Winchester	33	Iowa,	308	.....	541
Green County v. Conness	109	U. S.,	104	.....	526
Green v. Neal	31	U. S.,	291	.....	525
Green v. Peeso	92	Iowa,	261	.....	410
Grier v. Johnson	88	Iowa,	99	.....	674
Grieve v. Illinois Central R. Co.	104	Iowa,	659	.....	599, 600
Grimes v. N. W. Legion of Honor	97	Iowa,	315	.....	115
Grinnell v. Warner	21	Iowa,	11	.....	540
Gross v. Board	158	Ind.,	537	.....	527
Gullich v. Alford	61	Miss.,	224	.....	25
Guthrie Co. Bank v. Guthrie.	173	U. S.,	528	.....	676

H

Hackett v. Telegraph Co.	80	Wis.,	187	.....	246
Haley v. Jump River Co.	81	Wis.,	412	.....	246
Halfman v. Spreen	75	Iowa,	309	.....	157
Hall v. Hall	132	Iowa,	664	.....	6, 13
Hall v. Wells	54	Miss.,	301	.....	526

Haiwas v. Granite Co.....	123	N. W. (Wis.) 789	690
Hamilton v. Coal Co.	120	Iowa, 149	230
Hammer v. Janowitz	131	Iowa, 20	434
Hammond v. King	137	Iowa, 548	459
Hancock v. Hancock	134	Iowa, 475	480
Handy v. Insurance Co.....	1	R. I., 400	653
Hanson v. Cresco	132	Iowa, 540	481
Hanson v. Kline	136	Iowa, 101	357
Harlan v. Harlan	102	Iowa, 701	619
Harmon v. Auditor	123	Ill., 122	527
Harper v. Commonwealth...	93	Ky., 290	536
Harrison v. Fortlage	161	U. S., 57	563
Hart v. Deamer	6	Wend. (N. Y.) 497	733
Hart v. R. R. Co.....	109	Iowa, 631	201, 435
Hartman v. R. R. Co.	132	Iowa, 582	201, 207
Harvey v. Mason City & Ft. D. R. Co.	129	Iowa, 465	127, 377, 461
Haskett v. Maxey	134	Ind., 182	527
Hatlestad v. Hardin District Court	137	Iowa, 146	623, 672
Haugen v. Albina Light & Water Co.	21	Or., 411	628
Haugen & Co. v. McCarthey.	34	Iowa, 415	28
Hawaii v. Mankichi	190	U. S., 197	285
Hawes v. Swanzey	123	Iowa, 51	360
Hawks v. Fellows	108	Iowa, 135	672
Hawley v. Warde	4	G. Greene, 36	635
Haynes v. Sanborn	45	N. H., 429	632
Healey v. Assn.	133	Ill., 556	116
Healy v. Patterson	123	Iowa, 73	134
Healy v. Wipf, Sec.	117	N. W. (S. D.) 521	84
Heating Co. v. Kramer	127	Iowa, 142	34
Hegeman v. Western R. Corp.	16	Barb., 353	243
Heins v. Lincoln	102	Iowa, 77	349
Hendricks v. Gypsum Co.	133	Iowa, 89	693
Henderson v. McMahill	75	Iowa, 217	635
Henke v. McCord	55	Iowa, 378	345
Herndon v. Moore	18	S. C., 354	526
Hexom v. Knights, etc.	140	Iowa, 41	286
Heywood v. Perrin	10	Pick. (Mass.) 228	541
Hechorn v. Bradley	117	Iowa, 130	102
Higley v. Bunce	10	Conn., 436	484
Hoaglin v. Henderson	119	Iowa, 720	60
Hobbs v. Marion	123	Iowa, 726	582
Hodgin v. Toler	70	Iowa, 21	269
Hofflin v. Moss	67	Fed., 440	276
Holbrook v. Fahey	51	Iowa, 406	44

Holden v. Lathrop	65	Mich., 652	302
Hollenbeck v. City of Marion	111	Iowa, 69	461
Holly Mfg. Co. v. Venner...	143	N. Y., 639	674
Houston Ry. Co. v. Meador..	50	Tex., 77	243
Howard v. Parks	1	Tex. Civ. App., 603	630
Hoyt v. Hoyt	68	Iowa, 703	582
Huffman v. Telephone Co....	143	Iowa, 590	628
Hughes v. Funston	23	Iowa, 257	100
Hughes v. Jones	116	N. Y., 67	733
Hull v. Harker	130	Iowa, 190	252
Hullinger v. Hullinger	133	Iowa, 270	289
Hume v. Des Moines	125	N. W. (Iowa) 846	251, 381
Hunt v. Bratt	23	Iowa, 171	28
Hunt v. Tuttle	125	Iowa, 676	497
Hutchinson v. Brown, Sec....	122	Cal., 189	88
Hutcheson v. Peck	5	Johns (N. Y.) 196	323
Hyatt v. Cochran	37	Iowa, 309	611

I

Indianapolis Co. v. Wachstetter	88	N. E. (Ind. App.) 853.....	691
Ingle v. Hartman	37	Iowa, 274	411
Inhabitants of Bridgewater v. Inhabitants of Plymouth..	97	Mass., 382	653
In re Contempt by Four Clerks	111	Ga., 89	674
In re Contempt by Two Clerks	91	Ga., 113	674
In re Knox Will	123	Iowa, 24	198
In re Pryor	18	Kan., 72	674
In re Strang's Estate	131	Iowa, 596	55
In re Will of Miller	128	Iowa, 612	6
Iowa City v. McInerey	114	Iowa, 592	349
Iowa Loan & T. Co. v. Pond	128	Iowa, 600	681
Irwin v. Backus	25	Cal., 214	300

J

Jackson v. Collins	3	Cow. (N. Y.) 89	534
Jacobson v. U. S. Gypsum Co.	144	Iowa, 1	693
Jacobus v. Railway Co.	20	Minn., 125	595
Jasperson v. Scharikow	150	Fed., 571	546
Jenkins v. Shields	36	Iowa, 526	171
Jenks v. Shaw	99	Iowa, 604	576
Jerolman v. R. R. Co.....	108	Iowa, 177	202, 214
Jersey City v. Brown	32	N. J. Law, 504	25

Jones v. George	56	Tex., 149	103
Jones v. Jones	47	Iowa, 338	5, 12
Johnson v. City of Burlington	95	Iowa, 197	163
Johnson v. Prairie	91	N. C., 160	172
Joyce v. Holbrook	7	Abb. Prac. (N. Y.) 338	673
Judges v. Kribs	71	Iowa, 183	157
Judy v. Bank	133	Iowa, 252	506
Judy v. Bank	81	Mo., 404	645

K

Kane v. Bloodgood	7	Johns Ch. 90 (N. Y.)	172
Kay v. Pruden	101	Iowa, 60	115
Kelly v. R. R. Co.	118	Iowa, 390	205, 210
Keokuk v. Scroggs	39	Iowa, 447	345
Kent v. Halliday	23	R. I., 182	102
Kenyon v. R. R. Co.	118	Iowa, 349	201
Kerker v. Bettendorf Co.	140	Iowa, 209	690, 691
Kern v. May	92	Iowa, 674	278
Keyes v. Cedar Falls	107	Iowa, 509	230
Kimball v. Electric Co.	141	Iowa, 632	197
Kimbro v. Insurance Co.	134	Iowa, 84	286
Kistner v. Conery	109	Iowa, 439	353
Kitteringham v. Ry. Co.	62	Iowa, 285	196
Knadler v. Sharp	36	Iowa, 234	14
Knapp v. Cowell	77	Iowa, 528	644
Knepper v. Sands	194	U. S., 476	449, 452
Knudson v. Litchfield	87	Iowa, 111	546
Kohl v. Lynn	34	Mich., 360	452
Kuhlman v. Wieben	129	Iowa, 188	398

L

Lahart v. Thompson	140	Iowa, 298	82
Lake v. Wolfe	108	Iowa, 184	672
L'Amoreux v. Crosby	2	Paige (N. Y.) 422	732
Land Co. v. Hotel	134	N. C., 397	525
Lane v. Watson	51	N. J. Law, 186	527
Langworthy v. McKelvey ...	25	Iowa, 55	672
Lanier v. State	57	Miss., 102	517
Larrabee v. Selby	52	Cal., 506	674
Lawrence v. McKenzie	88	Iowa, 432	634
Ledon v. Havemeyer	121	N. Y., 179	563
Lee v. Percival	85	Iowa, 639	265
Lewis v. Symmes	61	Ohio St., 471	526
Little v. McGuire	43	Iowa, 447	435
Livermore v. Maxwell	87	Iowa, 706	577

Livingston v. McDonald	21	Iowa, 160	380
Livingston v. Rawyards Coal Co.	5	App. Cas., 25	554
Loeb v. Trustees	179	U. S., 472	527
Long v. Kansas City	107	Mo., 298	546
Long v. Telephone Co.	134	Iowa, 336	690
Lord Walpole Case	3	Ves., 402	58
Lorenz v. R. R. Co.	115	Iowa, 113	751
Lower v. Miller	66	Iowa, 408	301
Luick v. Luick	132	Iowa, 203	289
Lumber Co. v. Cicero	176	Ill., 27	350
Luton v. Palmer	69	Mich., 610	536
Lyon v. Richmond	2	Johns Ch. (N. Y.) 51	526
Lynn v. Morse	76	Iowa, 665	680

M

Mace v. Boedker	127	Iowa, 731	228
Mackerall v. Railroad	111	Iowa, 547	207
Macon Knitting Co. v. Mills.	65	N. J. Eq., 138	183, 184
Madson v. Rutten	16	N. D., 281	632, 633
Magee v. Railroad Co.	82	Iowa, 249	436
Maher v. People	10	Mich., 212	569
Mahoney v. Van Winkle	33	Cal., 448	674
Matt v. Iowa Mut. Aid Assn.	81	Iowa, 135	115
Manderscheid v. District Court	69	Iowa, 240	623
Manley v. Wolf	24	Iowa, 141	28
Marengo Sav. Bank v. Kent.	135	Iowa, 386	357
Margaret Pier Co. v. Hannam	3	B. & A., 266	533
Marion v. Chicago, R. I. & P. R. Co.	59	Iowa, 428	134
Marquis of Cholmondeley v. Lord Clinton	1	Jac. & W., I	172
Marshalltown Stone Co. v. Des Moines B. M. Co.	114	Iowa, 574	339
Marryay v. Quigley	119	Iowa, 6	174
Marston v. Swett	82	N. Y., 527	183
Martin v. Blattner	68	Iowa, 286	536
Martin v. Indemnity Co.	151	N. Y., 94	118
Martin v. Light Co.	131	Iowa, 734	228
Maryland Casualty v. Hudgins	72	S. W. (Tex. Civ. App.) 1047.	117
Mason v. Johnson	24	Ill., 159	284
Matteson v. Tucker	131	Iowa, 511	381
Mayes v. Railroad	63	Iowa, 562	694
McCann v. Day	57	Ill., 101	466
McCarthy v. Mulgrew	107	Iowa, 76	436

McClendon v. Wells	20	S. C., 514	148
McCollum v. McConaughy....	141	Iowa, 172	515
McCoy v. Poor	56	Md., 197	173, 174
McCullough v. Connelly	137	Iowa, 682	92
McElhenney v. Hendricks...	82	Iowa, 657	166
McFarland v. Muscatine	98	Iowa, 199	582
McGuire v. R. R. Co.	138	Iowa, 664	200
McGill v. Pintsch Com. Co....	140	Iowa, 429	461
McGuire v. Luckey	129	Iowa, 559	14
McKeever v. Beacom	101	Iowa, 173	328
McLaughlin v. State	45	Ind., 328	536
McLeod v. R. R. Co.	125	Iowa, 273	755
McLeod v. Thompson	138	Iowa, 304	357
McMahon v. Dubuque	107	Iowa, 63	377, 587
McMahon v. Smith	24	App. Div., 25	308
McSurely v. McGrew	140	Iowa, 163	676
Meagher v. Machinery Co....	187	Mass., 586	691
Mentzer v. Telegraph Co.	93	Iowa, 752	543, 643
Mercy D. & H. Board v. Gibbs	11	H. L. Cas., 686	242
Merrill v. Tobin	82	Iowa, 533	92
Methudy v. Ross	81	Mo., 481	25
Metropolitan Bk. v. Nat. Bk.	104	Iowa, 682	105
Meyer v. Dubuque County...	43	Iowa, 592	506
Meyer v. Railroad	134	Iowa, 722	207, 751
Meylink v. Rhea	123	Iowa, 310	711
Miles v. Kelly	25	S. W. (Tex. Civ. App.) 724..	541
Milles v. Milles		Cro. C. 241	543
Miles v. Tomlinson	110	Iowa, 322	480
Miller v. Fidelity & Casualty Co.	97	Fed. (C. C.) 836	117
Miller v. Miller	104	Iowa, 186	709
Milton v. Boyd	49	N. J. Eq., 142	451
Minot v. W. Roxbury	112	Mass., I	484
Mobile & O. R. Co. v. Stinson	74	Miss., 453	134
Montgomery v. Horn	46	Iowa, 286	5, 12
Montgomery Co. v. Severson.	64	Iowa, 326	546
Moon v. Hartsuck	137	Iowa, 236	635
Moore v. City Council of Perry	119	Iowa, 423	236
Moore v. Howe	115	Iowa, 62	162, 163
Moore v. R. R.	102	Iowa, 596	751
Moorehead v. Hyde	38	Iowa, 385	311
Morey v. Morey	113	Iowa, 152	14
Morrill v. County	33	S. W. (Tex. Civ. App.) 899..	542
Mountain Bank v. Douglass County	146	Mo., 42	527

Moyres v. Council Bluffs

Nursery Co.	125	Iowa, 673	28
Mueller v. Batchler	131	Iowa, 650	55
Mueller Lbr. Co. v. Mc- Caffrey	141	Iowa, 730	142
Muhlker v. New York & Harlem R. Co.	197	U. S., 544, 573	517, 526
Muldowney v. Ry. Co.	39	Iowa, 622	196
Munier v. Zachary	138	Iowa, 219	18
Murphy v. Hanscome	76	Iowa, 192	293
Murray v. Hobson	10	Colo., 66	534
Myers v. State	46	Ohio St., 473	674

N**Napa Valley Wine Co. v.**

Daubner	63	Minn., 112	541
National Mut. B. & L. Assn. v. Braham	193	U. S., 635	516
Naves v. Ball	66	Nebr., 606	544
Neal v. Bleckley	51	S. C., 506	172
Newcastle v. Doughty	168	Ind., 259	690
Newcomer v. Tucker	89	Iowa, 487	622
Newman v. De Lorimer	19	Iowa, 244	541
New York v. Ferry Co.	64	N. Y., 622	674
Nichodemus v. Young	90	Iowa, 423	680
North v. Johnson	58	Minn., 242	148
Norton v. Preston	15	Me., 14	340
Nosler v. Railroad	73	Iowa, 268	196
Nowlin v. Pyne	47	Iowa, 293	265

O**O'Ferrall v. Simplot**

O'Hara's Will	95	Iowa, 381	5, 12
Ohio Ins. Co. v. Delbolt	16	N. Y., 403	61
Ohlrogg v. District Court	126	How., 432	525
Olcott v. Fond du Lac County Sup'r's	16	Iowa, 247	672
Osterhout v. Shoemaker	3	Wall., 689	526
Ottumwa B. & Co. v. Ainley.	109	Gill (N. Y.) 513	733
Opinion of Judges	58	Iowa, 391	265
O'Reilly v. People	86	N. H., 625	526
Owens v. City of Marion....	127	N. Y., 154	574
Owensboro Gas Co. v. Hilde- brand	42	Iowa, 469	261
		S. W., 351	628

P

Packard v. Richardson	17	Mass., 122	527
Padrnos v. Century Fire Ins. Co.	142	Iowa, 199	510
Parker v. Hull	2	Head (Tenn.) 641	172
Parmeter v. Oakley	69	Iowa, 338	577
Parr v. McGown	98	S. W. (Tex. Civ. App.) 950..	29
Parsons v. Milford	67	Ind., 489	307
Parsons v. Mallinger	122	Iowa, 703	33
Passinger v. Thorburn	34	N. Y., 634	103
Patterson v. Linder	14	Iowa, 414	635
Patterson v. Nicol	115	Iowa, 284	157, 158
Patterson v. Townsend	91	Iowa, 725	206
Paul v. Travelers' Ins. Co....	112	N. Y., 472	116
Payne v. Hook	7	Wall., 425	305
Payne v. R. R.	108	Iowa, 188	751
Peacock v. Leffler	74	Ind., 327	302
Peck v. Ambler	113	Dyer (note)	543
Penny v. District	2	Q. B., 72	243
People v. Arenberg	105	N. Y., 123	529
People v. Board	138	N. Y., 95	88
People v. Briggs	114	N. Y., 63	529
People v. Durrant	116	Cal., 179	673
People v. Evans	72	Mich., 367	655
People v. Husband	36	Mich., 306	522
People v. Kibler	106	N. Y., 321	529
People v. Parent	139	Cal., 600	574
People v. Powell	63	N. Y., 88	522
People v. Sturtevant	9	N. Y., 263	672
People v. Thompson	155	Ill., 451	88
People v. West	106	N. Y., 293	529
Percival v. Harger	40	Iowa, 286	184
Percival v. Strathman	112	Iowa, 747	353
Perkins v. Scott	9	Ohio Cir. Ct. R., 207.....	308
Pervear v. Mass	72	U. S., 475	536
Phelps v. James	86	Iowa, 398	105
Philadelphia Co. v. Ry. Co... .	53	Pa., 20	527
Pickard v. Smith	10	C. B. N. S., 470	243
Pierce v. Emery	32	N. H., 508	534
Pierce v. Pierce	46	Ind., 86	515
Pierson v. R. R. Co.....	127	Iowa, 13	207
Pitkin v. Fletcher	47	Iowa, 53	635
Potter v. R. R. Co.	46	Iowa, 399	200
Porter v. Welsh	117	Iowa, 144	27
Potts v. Coleman	67	Ala., 221	545
Powers v. O'Brien	54	Iowa, 501	269

Powers v. Railway	143	Iowa, 427	207
Powers v. R. R. Co.	115	N. W. (Iowa) 496	209
Poweshiek Co. v. Dennison..	36	Iowa, 244	544
Prader v. Accident Assn....	95	Iowa, 149	115
Pratt v. Am. Bell Co.	141	Mass., 225	527
Pritts v. Ritchey	29	Pa., 71	62
Purcell v. R. R. Co.	109	Iowa, 629	205, 210
Pyron v. State ex rel. Lowe. 8		Ga., 230	674

Q

Quackenbush v. Railway Co. ..	73	Iowa, 458	995
-------------------------------	----	-----------------	-----

R

Rader v. Rader	136	Iowa, 223	289
Railroad Co. v. Marion	104	Ind., 239	435
Raine's Case	1	Swa. & T. (Eng.) 144	54
Randall v. Roper	84	E. B. & E.	103
Rasmussen v. U. S.	197	U. S., 516	285
Rawson v. Harger	48	Iowa, 269	184
Ray v. National Gas Co.	138	Pa., 591	526
Read v. East	20	R. I., 574	242
Redley v. Greiner	117	Iowa, 680	157
Regina v. Prince	2	L. R. 2 C. C. 154	522
Regina v. Reed	1	Carr & M., 306	522
Reed v. Reed	6	Ind. App., 317	323
Reed v. Root	59	Iowa, 259	265
Reed v. R. R. Co.	74	Iowa, 188	201
Reinhardt v. Gartrell	33	Ark., 727	305
Rex v. Hall	3	Carr & P., 409	522
Rex v. Osborne	74	L. J. K. B., 311	650
Richards v. Hintrager	45	Iowa, 253	269
Richards v. Homestead Co.	44	Iowa, 304	14
Richman v. Board	77	Iowa, 513	676
Richardson v. County	100	Tenn., 346	527
Richardson v. McLemore ..	64	Tenn., 586	653
Rietveld v. R. R. Co.	129	Iowa, 249	202, 216
Rigsby v. Supply Co.	108	S. W., 1128	690
Rivers v. Rivers	65	Iowa, 568	183
Robertson v. Moline Co.	106	Iowa, 414	611
Robinson v. Mandell	11959	Fed. Cas.	56, 58
Rock Island & P. Ry. Co. v. Dimick	144	Ill., 628	466
Rodgers v. Lumber Co.	102	Pac. (Or.) 601	690
Roemer v. City Canvassers...	90	Mich., 27	88
Rogers v. Johnson	25	Mo., 202	302

Rollins v. Proctor	56	Iowa, 326	635
Ross v. Fuller & Warren ...	105	Fed. (C. C.) 510	183
Root v. R. R. Co.	122	Iowa, 469	215
Rowe v. Barnes	101	Iowa, 302	619
Rudder v. Price	1	H. Bl., 547	542
Ruhlman v. Humphrey	86	Iowa, 602	622
Rule v. McGregor	117	Iowa, 419	102
Rumpel v. Railroad Co.	4	Idaho, 13	438
Rusch v. City	6	Iowa, 443	435
Russ v. Steamboat	9	Iowa, 374	198
Russell v. Critchfield	75	Iowa, 69	33
Ryalls v. Mechanics' Mills...	150	Mass., 190	527
Ryegate v. Wardsboro	30	Vt., 746	534

S

Sachra v. Town of Manilla..	120	Iowa, 562	196
Sayler v. State	5	Ind., 202	308
Sanders v. Pottlitzer	144	N. Y., 209	24
Sankey v. R. R. Co.	118	Iowa, 39	228
Savings Bank v. Colby	105	Iowa, 424	579
Sawyer v. Biggart	114	Iowa, 489	709
Schmertz v. Dwyer	53	Pa., 335	563
Schmidt v. Northern Life Assn.	112	Iowa, 41	661
Schminkey v. Sinclair Co.	137	Iowa, 130	693
Schneringer v. Schneringer..	81	Neb., 661	61
Schumaker v. Schmidt	44	Ala., 454	54
Schulte v. R. R. Co.	114	Iowa, 94	203, 751
Schultz v. Catlin	78	Wis., 611	653
Schultz v. Ford Bros.	133	Iowa, 402	480
Scofield v. Churchill	72	N. Y., 565	307
Scott v. Neises	61	Iowa, 62	269
Scott v. St. Louis, K. & N. W. R. Co.	112	Iowa, 54	134
Selensky v. R. R. Co.	120	Iowa, 113	751
Selkirk v. Stephen	72	Minn., 335	563
Shakman v. Potter	98	Iowa, 61	198
Sharp v. Arnold	108	Iowa, 203	157, 158
Shawyer v. Chamberlain	113	Iowa, 742	358
Shelby v. Burlington	125	Iowa, 343	265
Shelby v. Guy	11	Wheat., 368	525
Shelley v. Smith	97	Iowa, 259	681
Shepard v. Milwaukee Gas- light Co.	6	Wis., 539	628
Sherwood v. Sherwood	44	Iowa, 44	192
Shields v. N. Y.	84	App. Div., 502	264

Ship Canal Railway & Iron

Co. v. Cunningham	155	U. S., 354	453
Shirley v. Ry. Co.	74	Iowa, 169	461
Shook v. Shook	114	Iowa, 592	289
Silver v. Traverse	82	Iowa, 52	622
Sioux City & St. Paul R. Co. v. Chicago, M. & St. P. R. Co.	117	U. S., 406	444
Sioux City & St. Paul R. Co. v. United States	159	U. S., 349	446, 450, 451
Slater v. Merritt	75	N. Y., 268	674
Sloane v. Railroad Co.	111	Cal., 668	644
Slyfield v. Barnum	71	Iowa, 245	681
Smalley v. Greene	52	Iowa, 241	338
Smith v. Dell	30	Iowa, 594	412
Smith v. Eams	3	Scam. (Ill.) 76	653
Smith v. Foster	44	Iowa, 442	541
Smith v. Hickenbottom	57	Iowa, 733	196
Smith v. Knights of Macca- bees	127	Iowa, 115	661
Smith v. Lidgerwood	56	App. Div., 528	690
Smith v. Railway	38	Iowa, 518	377
Spaids v. Barrett	57	Ill., 289	148
Sparks v. Pittsburgh Co.	159	Pa., 295	24
Spelman v. Gill	75	Iowa, 717	269
Stallcup v. Tacoma	13	Wash., 152	526
State Bank v. Mottin	47	Kan., 455	632
State Center v. Barenstein... State v. Andrews	66	Iowa, 249	350
State v. Archer	84	Iowa, 88	219
State v. Arthur	48	Iowa, 310	674
State v. Baldwin	135	Iowa, 48	333
State v. Barnes	57	Iowa, 270	672
State v. Bebb	3	N. D., 319	536
State v. Bell	125	Iowa, 494	649, 650, 651
State v. Bennett	136	N. C., 674	523, 527
State v. Bernstein	128	Iowa, 713	222, 223
State v. Berning	129	Iowa, 520	514
State v. Bixby	74	Mo., 87	308
State v. Blydenburg	39	Iowa, 465	655
State v. Boomer	135	Iowa, 278	334
State v. Briggs	103	Iowa, 106	332
State v. Burkam	68	Iowa, 416	332
State v. Burns	23	Ind. App., 271	302
State v. Clark	119	Iowa, 663	648
State v. Clark	29	N. J. Law, 96	533
State v. Cloughly	145	Iowa, 731	334
State v. Cloughly	73	Iowa, 626	456

State v. Cohen	108	Iowa, 208	334
State v. Comptoir Nat.....	51	La. Ann., 1272	526
State v. Conner	69	Ala., 212	546
State v. Craig	78	Iowa, 637	332
State v. Crofford	133	Iowa, 478	333
State v. Cross	95	Iowa, 629	332
State v. Cutter	36	N. J. Law, 125	522
State v. DeGroate	122	Iowa, 661	332
State v. DeLano	80	Wis., 259	536
State v. Dennis	119	Iowa, 668	219
State v. D. M. R. R. Co....	135	Iowa, 694	270
State v. Dickson	6	Kan., 209	653
State v. Dockstader	42	Iowa, 436	655
State v. Donavan	125	Iowa, 239	333
State v. Doss	110	Iowa, 713	332
State v. Easton	113	Iowa, 516	332
State v. Evenson	122	Iowa, 88	221, 222
State ex rel. v. Cunningham.	83	Wis., 90	88
State v. Felter	25	Iowa, 67	196
State v. Ferguson	2	Hill (S. C.) 619	569
State v. Fitzgerald	49	Iowa, 260	519
State v. Frederickson	101	Me., 37	458
State v. Fulton	149	N. C., 485	523, 527, 530
State v. Gallaugher	123	Iowa, 378	573
State v. Gay	59	Minn., 21	573
State v. Goering	106	Iowa, 636	221
State v. Hanaphy	117	Iowa, 15	514
State v. Harvey	130	Iowa, 394	519
State v. Hathaway	100	Iowa, 225	566
State v. Hayden	131	Iowa, 1	656
State v. Hayward	141	Iowa, 196	84, 90, 92
State v. Height	117	Iowa, 650	651
State v. Hockett	70	Iowa, 442	569
State v. Holt	27	Mo., 340	300
State v. Huff	76	Iowa, 204	536
State v. Hull	18	R. D., 207	655
State v. Jones	89	Iowa, 182	222, 223
State v. Kabrich	39	Iowa, 277	655
State v. Kelly	74	Iowa, 589	519
State v. Kimes	145	Iowa, 346	334
State v. King	117	Iowa, 492	640, 650
State v. Kuhn	117	Iowa, 216	219
State v. Linhoff	121	Iowa, 632	218
State v. Mahan	68	Iowa, 304	224
State v. Mayor	109	Tenn., 315	527
State v. McCahill	72	Iowa, 111	333
State v. McKinnon	8	Or., 487	674

State v. Mulhern	130	Iowa, 46	332
State v. Mullenhoff	74	Iowa, 271	332
State v. Murdy	81	Iowa, 603	219
State v. Nelson	10	Idaho, 522	536
State v. O'Connell	99	Me., 61	457
State v. O'Malley	132	Iowa, 696	332
State v. Peres	27	Mont., 358	650
State v. Perigo	80	Iowa, 37	224
State v. Philpot	97	Iowa, 365	198
State v. Peterson	110	Iowa, 647	648
State v. Pollard	174	Mo., 607	650
State v. Pratt	20	Iowa, 268	565
State v. Rocker	130	Iowa, 239	568
State v. Rodman	58	Minn., 393	536
State v. Rennick	127	Iowa, 204	565
State v. Roney	37	Iowa, 30	87
State v. Rutledge	135	Iowa, 581	222
State v. Sherman	106	Iowa, 684	640
State v. Sparks	27	Tex., 705	674
State v. Spiers	103	Iowa, 711	456
State v. Squires	26	Iowa, 340	531
State v. Stafford	145	Iowa, 285	565
State v. Stanley	38	Iowa, 526	219
State v. Steidley	135	Iowa, 512	653
State v. Stevens	133	Iowa, 684	640
State v. Teeters	97	Iowa, 458	536
State v. Teipner	36	Minn., 535	650
State v. Townsend	66	Iowa, 741	219
State v. Upham	38	Me., 261	655
State v. Vance	17	Iowa, 138	569
State v. Walker	133	Iowa, 489	224
State v. Warner	100	Iowa, 260	222
State v. Waters	132	Iowa, 481	648
State v. Wheeler	116	Iowa, 212	649, 650
Starry v. R. R.	51	Iowa, 419	751
Strawhacker v. Ives	114	Iowa, 361	377
Stennett v. Bank	112	Iowa, 273	23
Stevens v. Carroll	130	Iowa, 463	506
Stephens v. State	20	Tex. App., 255	655
Stephenson v. Assn.	108	Iowa, 641	118
Stephenson v. Hanson	6	Civ. Proc. (N. Y.) 43	672
Stevenson v. Polk	71	Iowa, 278	540
Stockton v. Mfg. Co.	22	N. J. Eq., 56	527
Stoner v. Railway	109	Iowa, 551	141
Storrie v. Cortes	90	Tex., 283	516, 525
Strauss v. Bank	36	Hun (N. Y.) 451	644
Strauss v. Bank	122	N. Y., 379	644

Streicher v. Davenport Co....	124	N. W. (Iowa) 327	693
Sullens v. Railway	74	Iowa, 659	127, 380
Sullivan v. Sullivan	139	Iowa, 679	62
Sutherland v. Insurance Co..	87	Iowa, 505	595
Sutton v. Davis	64	N. Y., 633	674
Swain v. Schieffelin	134	N. Y., 471	103
Swan v. Harvey	117	Iowa, 58	681
Swan v. Indianola	142	Iowa, 731	235, 236
Swan v. Ry. Co.	72	Iowa, 650	466
Swanson v. Ottumwa	131	Iowa, 540	516, 525
Swartwout v. Johnson	5	Cow. (N. Y.) 74	545
Sweetland v. Tel. Co.	27	Iowa, 433	105
Swigert v. Tilden	121	Iowa, 650	339

T

Tackman v. Brotherhood ...	132	Iowa, 64	118
Taylor v. Dugger	66	Ala., 444	546
Taylor v. Coal Co.	110	Iowa, 40	230, 434
Taylor v. Ins. Co.	116	Iowa, 625	286
Taylor v. Ypsilanti	105	U. S., 72	527
Tewkesbury v. Bennett	31	Iowa, 83	100
Texas R. Co. v. Juneman....	71	Fed., 939	243
Thayer v. Keyes	136	Mass., 104	303
The Brig William Gray	1	Paine (U. S. C. C.) 16	522
Thompson v. Lee County ...	3	Wall., 331	517
Thurber v. Jewett	3	Mich., 295	633
Tod v. Crisman	123	Iowa, 700	164
Todd v. Davey	60	Iowa, 532	544
Tolbert v. Horton	31	Minn., 518	452
Tone v. Shankland	110	Iowa, 525	635
Towers v. Railway	143	Iowa, 427	207
Trabant v. Rummell	14	Or., 17	527
Trainer v. Railway Co.	137	Pa., 148	244
Tretter v. Railway	126	N. W., 339	587
Trinity v. United States	143	U. S., 457	534
Tucker v. Randall	2	Mass., 283	542
Tucker v. Stewart	121	Iowa, 714	297, 299
Tuttle v. Viers	14	Iowa, 515	544
Turner v. Commonwealth ..	2	Metc. (Ky.) 619	674
Tweedy v. State	5	Iowa, 433	223

U

United States v. Kirby	74	U. S., 482	533
United States v. Palmer	16	U. S., 631	533
Utter v. Franklin	172	U. S., 416	676

V

Valley Bank v. Jackaway ...	80	Iowa, 512	634
Van Dyne v. Vreeland	12	N. J. Eq., 142	58
Van Wagenen v. Supervisors ...	74	Iowa, 716	506
Vermont Co. v. Railroad Co..	63	Vermont, 23	526
Verplank v. Hall	21	Mich., 469	674
Vorhees v. Arnold	108	Iowa, 85, 86	281
Vorse v. Phillips	37	Iowa, 428	149
Vosburgh v. Railroad	94	N. Y., 374	245

W

Wadsworth v. Sharpsteen ...	8	N. Y., 388	733
Wald v. Wald	124	Iowa, 183	480
Walker v. Ehrensman	79	Neb., 775	452
Walker v. State	12	S. C., 271	526
Walker v. Walker	14	Ohio St., 157	54
Wall v. Ambler	11	Iowa, 274	540
Wallace v. Wallace	137	Iowa, 37	281
Wallis v. Truesdell	6	Pick. (Mass.) 455	635
Walsh v. Aetna Ins. Co.	30	Iowa, 133	286
Wapello State Bank v. Colton	143	Iowa, 359	171
Ward v. Marshalltown	132	Iowa, 579	206
Ward v. Thompson	48	Iowa, 588	653
Warder v. Baker	54	Wis., 49	635
Watkins v. Holman	16	Pet., 25	546
Webster City Grocery Co. v. Losey	108	Iowa, 687	634
Weitz v. Ind. Dist.	79	Iowa, 427	24
Wells v. Railroad	56	Iowa, 520	604
Wensel v. Insurance Co.	129	Iowa, 295	511
Wescott v. Meeker	144	Iowa, 311	174
Westbrook v. Deering	63	Me., 231	484
Western Com. Trav. Assn. v. Smith	56	U. S. App., 393	118
West Jersey Traction Co. v. Camden	58	N. J. Law, 536	674
Wharton's Estate	132	Iowa, 716	729
Wharton v. Stevens	84	Iowa, 107	381
White v. Miller	71	N. Y., 118	102
White v. Ross	47	Mich., 172	323
White v. Byam	96	Iowa, 166	582
Whitmore v. Tatum	54	Ark., 457	634
Whitney v. Goddard	37	Mass., 304	284
Whitney v. Whitney	14	Mass., 88	534
Whitney's Lessee v. Webb ..	10	Ohio, 513	284

Whitney v. Farrar	51	Me., 418	632
Whitsett v. Ry. Co.	67	Iowa, 150	196
Wickersham v. Savage	58	Pa., 369	526
Wilkin v. Wilkin	91	Iowa, 652	680
Will of Davis	120	N. C., 9	54
Will of Diez	50	N. Y., 88	54
Willoughby v. Lawrence	116	Ill., 11	746
Willfong v. R. R.	116	Iowa, 548	751
Will of Sellick	125	Iowa, 680	729
Williams v. Mutual Gas Co..	52	Mich., 499	628
William Rogers Co. v. Rogers	38	Conn., 121	674
Willitts v. Railway	88	Iowa, 281	380
Wilson v. Dawson	52	Ind., 513	644
Wilson v. Duncan	74	Iowa, 491	381
Wilson v. Green	49	Iowa, 251	172
Wilson v. Russell	73	Iowa, 395	681
Wilson v. White	71	Ga., 506	243
Winey v. Railroad	92	Iowa, 622	207
Wisecarver v. Chicago, R. I. & P. R. Co.	141	Iowa, 121	600
Witt v. Day	112	Iowa, 110	305
Wolcott v. Mount	36	N. J. Law, 262	103
Wolf v. Wolf	97	Iowa, 279, 285	301
Wood v. Cullen	13	Minn., 397	542
Wood v. Griffith	141	Iowa, 314	353
Woodworth v. McCollum ...	16	N. D., 42	577
Wright v. Breckenridge	125	Iowa, 197	8

Y

Yick Wo v. Hopkins	118	U. S., 359	351
Young v. State	74	Neb., 346	221

STATUTES CITED, CONSTRUED, ETC., IN THE OPINIONS REPORTED IN THIS VOLUME.

Constitution of United States.	Code Supp. 1907.		
Art. 14	344	Chaps. 3, 4, Title 6	75
United States Statutes.		Chap. 8, Title 24	75
Act May 12, 1864,	444, 449	Chaps. 3, 4, Title 6	84
Act March 3, 1887, 445, 448, 449, 450 (U. S. Comp. St. 1901, p. 1595)	445	Sec. 592a	482
State Constitution.		Sec. 1087a1	75, 85
Art. 1, Sec. 6	344	Sec. 1087a10	80
Art. 1, Sec. 17	524	Sec. 1087a19	79, 81, 89
Art. 1, Sec. 21	531	Sec. 1087a24	76, 84, 86
Art. 3, Sec. 29	458	Sec. 1087a26	85
Art. 5, Sec. 4	44	Sec. 1087a29	77
Acts 19th General Assembly.		Sec. 1528	482
Chap. 107	444	Sec. 1533	483
Acts 20th General Assembly.		Sec. 1989a53	251
Chap. 71	444	Sec. 2382	514
Acts 23d General Assembly.		Sec. 2510j	317
Chap. 281	665	Sec. 3279a	11, 12
Acts 33d General Assembly.		Sec. 3376	10
Chap. 78	715	Sec. 4999a22	344, 347
Chap. 143	328	Sec. 5028j	344, 347, 349
		Code 1897.	
		Chap. 13, Title 12	345, 458
		Chap. 14	607
		Chap. 13	344
		Sec. 195	556
		Secs. 416, 417	74, 82, 83
		Secs. 418, 419	75
		Secs. 563, 564, 567	482
		Secs. 568, 575	482
		Secs. 585, 586	482
		Secs. 666, 865, 868	262
		Sec. 680	340

Sec. 685	237	Sec. 2927 et seq.	579
Secs. 685, 979, 984	236	Sec. 3154	60, 709
Sec. 696	348	Sec. 3157	60
Secs. 810, 811, 812	262	Sec. 3180	706
Sec. 812	235	Sec. 3270	10, 59, 147
Secs. 812, 966	235	Sec. 3281	325
Secs. 820, 830, 832, 967	236	Sec. 3323	185
Secs. 823, 824, 839	237	Sec. 3340	166
Secs. 866, 867	262	Sec. 3366	5, 10, 62
Sec. 952	237	Sec. 3367	7, 10, 12
Secs. 965, 966	237	Sec. 3369	10
Sec. 1089	86	Sec. 3375	11
Sec. 1100	76, 86	Sec. 3376	62
Sec. 1102	77, 84, 86	Sec. 3378	11
Secs. 1103, 1104	78	Sec. 3426	543
Sec. 1103	85	Sec. 3453	303
Secs. 1103, 1104	89, 90	Sec. 3466	164
Sec. 1318	501	Sec. 3496	27
Secs. 1318, 1323	500, 502, 503	Sec. 3499	115
Secs. 1318, 1323, 1374	504	Sec. 3502	145
Secs. 1441, 1448	681	Sec. 3541	393
Sec. 1448	680	Secs. 3541, 4169	392
Secs. 1528, 1529, 1549	483	Sec. 3652	44
Secs. 1607, 1609	328	Sec. 3885	150
Secs. 1613, 1614	120	Secs. 3885, 3887	148
Sec. 1789	659	Sec. 3887	149
Secs. 1789, 1824	662	Sec. 3955	473
Sec. 2072	200	Secs. 3991, 3992	146, 147
Sec. 2164	492	Sec. 3992	148, 150
Sec. 2382	456	Sec. 4110	353, 480, 491
Secs. 2382, 2383	536	Sec. 4154	87
Sec. 2405	42	Sec. 4163	391, 392
Sec. 2406	43	Secs. 4297, 4298	540
Sec. 2407	623	Sec. 4341	88, 505
Sec. 2415	571	Sec. 4481	27
Secs. 2432, 2460	328	Sec. 4604	47, 166
Sec. 2485	550, 555	Sec. 4626	740
Secs. 2522, 2524, 2526	346	Sec. 4989	344, 346
Secs. 2525, 2568	344, 345	Sec. 5254	331
Sec. 2555	562	Sec. 5258	332
Secs. 2911, 3905, 3979	633	Sec. 5301	113

J.J.C.

7/6/11

